

STATE OF MICHIGAN
IN THE SUPREME COURT

KELLY-STEhNEY & ASSOC., INC., a
Michigan Corporation,

Plaintiff/Appellant,

v.

MACDONALD'S INDUSTRIAL PRODUCTS,
INC., a Michigan Corporation,

Defendant/Appellee.

Supreme Court Docket
No. 123118

Court of Appeals Docket
No. 238079

Circuit Court Docket
No. 00-028074-CK

Michael J. O'Shaughnessy (P37229)
Colombo & Colombo,
Attorney for Plaintiff/Appellee
P.O. Box 2028
Bloomfield Hills, Michigan 48303-2028
248.645.9300

David J. Gass (P34582)
S. Grace Davis (P58412)
Salvatore Pirrotta (P62596)
Miller, Johnson, Snell & Cummiskey, P.L.C.
Attorneys for Defendants/Appellant
250 Monroe Avenue, N.W., Suite 800
P.O. Box 306
Grand Rapids, MI 49501-0306
616.831.1700

DEFENDANT/APPELLEE MACDONALD'S INDUSTRIAL PRODUCTS, INC.'S
BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

Defendant/Appellee, MacDonald's Industrial Products, Inc., acknowledges this Court's jurisdiction over Plaintiff/Appellant's, Kelly-Stehney & Assoc., Inc. ("Kelly-Stehney"), appeal of the lower court's January 3, 2002, Opinion and Order (the "Order").

MacDonald's contends, however, that this Court does not have jurisdiction over all four of the "Questions Presented" in Kelly-Stehney's Brief on Appeal. (K-S Brf., p. vi). Only the issue identified in Kelly-Stehney's first question was raised in its Application for Leave to Appeal. Thus, that is the only issue properly preserved for appeal. *See* MCR 7.302(G)(4)(a); *see also* MacDonald's Motion to Strike and supporting brief, filed Sept. 23, 2003.

**STATEMENT REGARDING SIMILAR CASES CURRENTLY PENDING BEFORE
THE SUPREME COURT**

MacDonald's is aware of no currently pending or recently decided decisions that present issues similar to the sole issue properly before this Court, which is the continued viability of the equitable estoppel defense to the statute of frauds.

Kelly-Stehney mistakenly claims that this Court's decision in *Quality Products & Concepts Co v Nagel Precision, Inc*, No. 119219; ____ Mich ____; 666 NW2d 251 (2003), has a "direct bearing" on this appeal. (K-S Brf., p. 4). It does not. *Quality Products* addressed the issue of mutual assent. That issue is not properly preserved for appeal in this case. See MacDonald's Motion to Strike, *supra*.

COUNTER-STATEMENT OF QUESTION PRESENTED

- I. Equitable estoppel was a well-established common law defense to the statute of frauds for 150 years *before* the Legislature first enacted the statute in 1847. Under each of Michigan's Constitutions, the common law at the time the Constitution was adopted, is the law of this State, unless it is expressly abrogated by the Legislature. While the statute has been amended 12 times, the Legislature has never manifested an intent to abolish the common law defense. Should this Court overturn the 300-year-old common law defense of equitable estoppel, which by Constitution is the law of the state, where there has never been a manifest legislative intent to abrogate it and where it is necessary to prevent a fraud, as in this case?

Defendant/Appellee MacDonald's says "No."

Plaintiff/Appellant Kelly-Stehney says "Yes."

SUMMARY OF CASE AND ARGUMENT

This is a sales commission case. Plaintiff-Appellant, Kelly-Stehney & Associates, Inc. ("Kelly-Stehney"), is a sales representative. Defendant-Appellee, MacDonald's Industrial Products, Inc. ("MacDonald's"), manufactures automotive parts. MacDonald's has paid \$2.2 million in commissions to Kelly-Stehney, but Kelly-Stehney contends that it is entitled to over \$1.4 million more and thus filed this lawsuit in December, 2000.

MacDonald's moved for summary disposition under MCR 2.116(C)(10). The Trial Court, holding Kelly-Stehney to its bargain and preventing fraud, properly granted the motion. The Court of Appeals unanimously affirmed.

Kelly-Stehney sought leave to appeal. In its Application, Kelly-Stehney did not challenge the Court of Appeals' decision that the undisputed material facts and current state of the law required summary dismissal of its Complaint. Instead, it asked this Court to review one discrete legal issue: to "reassess the viability" of the equitable estoppel defense to the statute of frauds and to "do away with it." (Kelly-Stehney Brf., p. 8).

This Court should decline Kelly-Stehney's request and affirm the courts below. Contrary to Kelly-Stehney's assertion, the defense is not a tool for judicial legislation. Nor is it a principle of statutory interpretation. It is a part of the common law. It has been recognized as such for over 300 years, and has been consistently applied by Michigan Courts since the beginning of Michigan's statehood. *See Evans v Bicknell, infra*. By Constitution, the common law is the law of the State of Michigan and stands on equal footing with legislative law. By Constitution, the Legislature can abrogate or change the common law, but only by unequivocal and express mandate. Since 1847, when the statute was first enacted in Michigan, the Legislature has never manifested such an intent. There is no textual or other support to "do away with" the defense.

Instead, this case is a textbook example of why the defense exists, has never been curtailed by the Legislature, and should continue to exist as one of Michigan's most firmly-embedded common law rules.

Here, the parties entered into a three-year Manufacturer's Representative Agreement ("MRA") in which MacDonald's agreed to pay to Kelly-Stehney a 3% commission on sales to certain accounts, including Daimler Chrysler ("Chrysler"). Under the MRA (which was drafted by Kelly-Stehney), after three years MacDonald's could terminate the agreement for any reason and, upon termination, MacDonald's was obligated only to pay Kelly-Stehney post-termination commissions for one year. After three years, the MRA was terminable at will on a year-to-year basis.

During the three-year term of the MRA, MacDonald's negotiated with Chrysler for significant work on a window molding part known as the "DLO." The problem (from Kelly-Stehney's perspective) is that the DLO work, which was projected to last five years and generate millions of dollars in sales, was to be produced beginning in late 1997 or 1998, after the three-year MRA expired. Thus, MacDonald's had the contractual right to terminate the MRA and to not pay commissions to Kelly-Stehney on most of the DLO work. Kelly-Stehney admitted that the possibility of termination was always a "big concern."

Not surprisingly, before the MRA ended, Kelly-Stehney requested a five-year extension to "protect" itself from losing DLO commissions. Understandably, MacDonald's would not agree to this because, if it did so, MacDonald's would give up its legal right to terminate without cause and would be obligated to pay substantial commissions to Kelly-Stehney for five more years, without receiving any additional benefit.

While MacDonald's was unwilling to give up the at-will termination benefit of the MRA and was unwilling to pay windfall commissions to Kelly-Stehney, it agreed to continue the relationship beyond the three year term on modified terms. After some negotiations, the parties reached an oral agreement ("DLO Agreement") in which:

1. their relationship was extended three years;
2. commissions would be reduced from 3% to a declining scale of 3% for Model Year 1998, 2% for Model Year 1999, and 1.5% for Model Year 2000; and
3. commissions would be calculated on a fixed piece price of \$21.86, instead of the actual invoice price.

In accordance with the DLO Agreement and without any objection from Kelly-Stehney, MacDonald's paid commissions to Kelly-Stehney on DLO parts as follows:

Model Year 1998 (3%)	\$ 396,225
Model Year 1999 (2%)	\$ 589,977
Model Year 2000 (1.5%)	\$ 363,422
TOTAL	\$ 1,349,624

All commissions were paid at \$21.86 per part. (Chart, Apx. 139b) These payments were all made by checks and were documented by corresponding commission statements. Without a word of protest, Kelly-Stehney continued its work, endorsed and cashed the checks, and accepted the benefits of the DLO agreement.

The benefits to Kelly-Stehney were significant. For four years it received approximately \$1.75 million in DLO and other commissions that it would not have been paid had MacDonald's exercised its contractual right to terminate the MRA in February 1997.

The undisputed material facts that support the Court of Appeals' affirmance of the Trial Court's grant of summary disposition were largely supplied by Kelly-Stehney's principal, Ed Stehney, who testified:

- Kelly-Stehney “accepted” the reduced rates and the \$21.86 piece price because it “didn’t want to lose [its] commissions.”
- As it received and cashed checks for large sums, Kelly-Stehney knew that it was being paid commissions on a base price of \$21.86 and at reduced rates.
- Kelly-Stehney did not object to these payments because it knew that, had it objected, MacDonald’s could and would have terminated the MRA immediately.
- Kelly-Stehney deliberately chose not to object because, if MacDonald’s did not cancel the MRA, Kelly-Stehney expected to earn well over \$1 million in future commissions, because the DLO program was expected to last through the 2002 model year.
- Kelly-Stehney sent a letter to MacDonald’s, almost two years into the reduced commissions, admitting that Kelly-Stehney had “yielded” to MacDonald’s demands for reduced commission rates.

Chrysler terminated MacDonald’s as DLO supplier by giving notice in May 1999, with production to end in June 2000. In January 2000, MacDonald’s terminated the MRA representation agreement with Kelly-Stehney and continued to pay post-termination commissions for the next year, as required.

In May 2000, five months after its termination, Kelly-Stehney — for the first time and now with nothing to lose — contended that it had never agreed in writing to the reduced rates, and that MacDonald’s owed it another \$1.4 million based on a 3% commission rate and a higher piece price of approximately \$27.50 per part. Kelly-Stehney objected only after receiving the benefit of its bargain — over \$1.75 million in commissions that it never would have received had MacDonald’s exercised its contractual right to terminate the MRA in February 1997. While admitting its assent to the terms of the DLO agreement and acknowledging its receipt of all benefits, Kelly-Stehney said a promise is only a promise and a deal is only a deal if it is in writing.

The Trial Court rejected Kelly-Stehney's position and summarily dismissed its claim, stating:

THE COURT: All right. The Court has reviewed this matter at great length. I've read the briefs. I'm familiar with the contract – – and the oral contract. I think the testimony is clear. I'm granting Defendant's motion for summary disposition, um, because the action is barred by the parties' subsequent oral agreement and I don't find that it is barred by the statute of frauds. The parties had a valid agreement for a reduced rate of commission and a reduced unit price, and Mr. Stehney very clearly testified that he had to accept it or Defendant was within its rights to terminate the relationship between the parties. Um, I think the Plaintiff is barred by equitable estoppel as well, and that's the decision.

(Transcript of Trial Court Order, p.17, Apx. 27b) (emphasis added).

The Court of Appeals affirmed, stating:

Applying the equitable estoppel defense to the facts of this case, we first conclude that, through Stehney's words and actions, plaintiff intentionally or negligently induced defendant to believe that it had assented to the oral DLO agreement. [*Kelly-Stehney & Assoc v MacDonald's Industrial Products, Inc*, 254 Mich App 608, 617; 658 NW2d 494 (2003), Apx. 36a.]

It went on to say:

We conclude that plaintiff's acceptance of the reduced commission checks, plaintiff's silence and failure to firmly object, and plaintiff's act of continuing to work for defendant while accepting the commissions checks shows that plaintiff intentionally or negligently induced defendant to believe that it had accepted the terms of the oral DLO agreement. Plaintiff did not object because it did not want to jeopardize its business relationship with defendant or risk defendant's termination of the contract. Instead, plaintiff waited until after the contract was terminated to object. In this way, plaintiff misled defendant into believing that it had accepted the terms of the oral DLO agreement. [*Id.* at 621, Apx. 38a.]

Second, the Court concluded that “[a]s a [m]atter of [l]aw, Defendant [j]ustifiably [r]elied [u]pon [i]ts [b]elief that Plaintiff [a]ccepted the [t]erms of the Oral DLO Agreement.”

Id.

And the Court “determine[d] that there is no question of fact that defendant would be prejudiced if plaintiff is allowed to deny the validity of the oral DLO agreement.” Apx. 39a.

It held:

Looking at the totality of the factual circumstances, we conclude that under the current state of the law, there is no question that the equitable estoppel doctrine applies to this case and that the statute of frauds does not bar enforcement of the oral DLO agreement. [*Id.* at 624-625, Apx. 39a.]

The holdings of the Trial Court and the Court of Appeals are based on well established Michigan jurisprudence.

Equitable estoppel is a 300-year-old common law defense to the statute of frauds. Under each of Michigan’s Constitutions (1835, 1850, 1908 and 1963), the existing common law “shall remain in force” and stands on an equal footing with legislative law. While the legislature can abrogate the common law, it can only do so by an express mandate, something it has never done since 1847 when the statute of frauds was first enacted. Indeed, the doctrine of equitable estoppel has consistently been applied for over 300 years and from the beginning of Michigan’s jurisprudence. And the facts of this case are a perfect example of why the doctrine has existed and should continue to exist, in order to prevent fraud.

Importantly, and contrary to Plaintiff’s assertion, this is not a case about statutory construction or judicial law making. Rather, it is about Michigan’s Constitutional mandate that the common law and legislative law be read together. And regarding equitable estoppel and the statute of frauds, Michigan jurisprudence has, from its inception, consistently honored that mandate.

The decision of the Court of Appeals should be **AFFIRMED**.

CONCISE COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Sections I - XII below are the undisputed material facts upon which the Trial Court and Court of Appeals based their opinions.

I. The Parties.

MacDonald's is a 30-year-old, family-owned and operated company that manufactures primarily automotive parts. Robert E. MacDonald, Sr. ("Mr. MacDonald") is its President.

Kelly-Stehney was formed in 1993 by Dennis Kelly and Ed Stehney ("Mr. Stehney"). Mr. Stehney is the principal person who dealt with MacDonald's.

II. The 1994 Manufacturer's Representative Agreement.

Kelly-Stehney admits that it drafted the written manufacturer's representation agreement (the "MRA"), which became effective when Kelly-Stehney signed it on February 23, 1994. It is undisputed that the MRA was a 3-year agreement. It is also undisputed that, upon termination of the MRA, MacDonald's was only required to pay to Kelly-Stehney post-termination commissions for 12 months following the date of termination, regardless of the amount of business procured by Kelly-Stehney or how long it was to last.

III. After the MRA Is Signed, MacDonald's Is Awarded the DLO Business from Chrysler and Kelly-Stehney Attempts to Extend the MRA by Five Years to Cover the Anticipated Substantial DLO Commissions.

Several months after the parties signed the MRA, MacDonald's began to negotiate the DLO Program with Chrysler. MacDonald's submitted its first quote to Chrysler in December 1994, but it was not until 1995 that Chrysler confirmed that MacDonald's would likely be awarded the DLO business. In November 1995, Kelley-Stehney became confident that MacDonald's would be Chrysler's exclusive supplier of DLO parts for the life of the DLO

Program, which it anticipated would be five model years (MYs 1998–2002) and would generate substantial sales for MacDonald’s. (Stehney, 96–97, 99–103, 105–106, 111, Apx. 80b-84b.)

Kelly-Stehney knew that under the MRA MacDonald’s had an absolute right to terminate Kelly-Stehney as of February 1997. (Stehney, 100–101, Apx. 81b-82b.) Mr. Stehney testified that he knew that, if MacDonald’s terminated Kelly-Stehney as of that date, then Kelly-Stehney would not be entitled to commissions after February 1998 (12 months following the date of termination). (Stehney, 105–106, Apx. 83b.) If this occurred, Kelly-Stehney would only be paid commissions on DLO sales for about two months (because the DLO did not actually go into production until December 1997). (Stehney, 105–106, Apx. 83b.) Stehney admitted that MacDonald’s right to terminate Kelly-Stehney as of February 1997 was a “big concern,” a “big worry,” and was “always an issue” for Kelly-Stehney. (Stehney, 104, 108, 110–111, 177, Apx. 82b-84b, 101b.)

It was this concern that prompted Kelly-Stehney to send to MacDonald’s an October 25, 1995 letter, proposing a five-year extension of the MRA. (Stehney, 106, Apx. 83b; Letter, 3a.) During his deposition, Mr. Stehney testified:

Q Now, if . . . the contract start is February of ‘94, you understood, from the contract, that Bob MacDonald had the absolute right to terminate you in February of ‘97?

A [Stehney] Yes.

Q And if he did that, if he terminated you in February ‘97, then he would be obligated, under the contract, to pay you commissions until February—or through January, depending on the particular day—but for purposes of discussion, let’s just say February of ‘98; right?

A Yeah.

Q And your concern was that the DLO manufacture was targeted to start in approximately July of ‘97; right?

A **Correct.**

Q And if that termination took place under the contract, you would not be paid commissions for the DLO after February of '98?

A Yes.

Q And that concern of yours is what precipitated your sending Bob MacDonald this October 25th, 1995, letter?

A Yes.

Q Now, going back to that letter, it says: "It is my intention to renew our commitment to each other with this extension, put these matters behind us, and concentrate on the business of selling. Therefore, I am requesting you review the enclosed update to our current contract. Your acceptance would put to rest any insecurities I have regarding our future relationship." When you said "any insecurities," what did you mean by that?

A **With a written contract, I would feel much more secure, with a five-year extension.**

Q Your insecurities were that—if Bob MacDonald terminated the contract, that you would not get significant commissions for future DLO work?

A **That would be correct.**

(Stehney, 105–106, Apx. 83b (emphasis added).) Kelly-Stehney thus proposed a five-year extension and amendment to the MRA. (Stehney, 100, Apx. 81b; Proposal, Apx. 130b.)

MacDonald's rejected Kelly-Stehney's proposal because it provided MacDonald's with no additional benefit. (Stehney, 110, Apx. 84b; MacDonald, Sr., 81, Apx. 114b) MacDonald's was legally entitled to terminate the MRA as of February 1997, and to pay Kelly-Stehney its last DLO commission as of February 1998. (MacDonald, Sr., 82–83, Apx. 114b–115b.)

IV. MacDonald's Offers Not To Terminate Kelly-Stehney Under the MRA, But Only If Kelly-Stehney Agrees to Accept DLO Commissions for MYs 1998–2000 at a Reduced Rate and a Fixed \$21.86 Base Price.

MacDonald's did not agree to Kelly-Stehney's proposal, but was willing to forego its legal right to terminate the MRA in February 1997 in exchange for a three-year extension of the MRA and a "special agreement" on DLO commissions for MYs 1998–2000 (the "DLO Agreement"). (Stehney, 128, Apx. 88b; MacDonald, Sr., 52–55, 107, Apx. 109-b-110b, 116b.) The "DLO Agreement" was an oral agreement that provided for commissions to be paid based on a fixed base price of \$21.86 and on a sliding scale of commission rates: a 3 % rate for MY 1998 (July 1997–June 1998), a 2 % rate for MY 1999 (July '98–June '99), and a 1.5 % rate for MY 2000 (July '99–June '00). (Stehney, 128–130, 147–150, Apx. 88b-89b, 93b-94b.) In exchange, MacDonald's agreed not to terminate its relationship with Kelly-Stehney during this time. (Stehney, 129, Apx. 89b.)

V. Kelly-Stehney Knowingly Accepts \$1.35 Million in Commissions Paid According to the DLO Agreement for Approximately Three Years Without Objection.

Mr. Stehney testified that Kelly-Stehney knew that MacDonald's was paying Kelly-Stehney according to the DLO Agreement for the remaining three years of the parties' relationship – from July 1997 until MacDonald's last shipment of DLO parts in June 2000. (Stehney, 146–148, 152, Apx. 93b-94b.) Mr. Stehney explained that MacDonald's provided Kelly-Stehney with monthly commission checks and supporting documentation that clearly set forth the commission rate and \$21.86. (Stehney, 55–56, 134–36, 145–46, Apx. 70b, 90b, 93b; *see* Representative Sample of Checks and Supporting Documentation, Apx. 29b-55b). He also admitted that he reviewed the commission checks and supporting documentation and that, based on his monthly reviews, Kelly-Stehney knew that MacDonald's had paid commissions at the reduced rates and at the \$21.86 fixed base price. (Stehney, 145–152, 155–57, 160–162, Apx.

93b-94b, 95b-97b.) Furthermore, as evidenced by Kelly-Stehney's July 26, 1999 letter to MacDonald's, when Kelly-Stehney's audits revealed a discrepancy in a commission payment, Kelly-Stehney notified MacDonald's promptly and in writing. (See Letter, Apx. 135b.)

Despite this knowledge and its practice of alerting MacDonald's to alleged commission underpayments, Kelly-Stehney did not object to any of the monthly DLO commissions that MacDonald's paid for the remaining three years of the parties' relationship (MYs 1998–2000). (MacDonald, Sr., 125, 151–154, Apx. 118b, 121b.) The first written objection to the reduced commissions came five months after Kelly-Stehney's termination. (Stehney, 152-153, Apx. 94b-95b.) Mr. Stehney admitted the reason for Kelly-Stehney's acceptance of DLO commissions over the years: Kelly-Stehney knew that MacDonald's would exercise its right to cancel the MRA at any time if Kelly-Stehney refused to accept the terms of the DLO Agreement. (Stehney, 147–151, Apx. 93b-94b) Mr. Stehney testified:

Q And you knew that—if you contacted Bob MacDonald and told him that the two percent was unacceptable, that he had the right to cancel the contract that very same day?

A [Stehney] Yes.

Q And the reason why you didn't tell Bob MacDonald that you disagreed with the two percent is because you were concerned that—if you did express your disagreement, that he would exercise his right to cancel the contract immediately; correct?

A Yes.

(Stehney, 147, Apx. 93b (emphasis added).) As to the base price, Stehney testified:

A [Stehney] At \$21.86, I said, "No, that's not correct." Mr. MacDonald said, "That's all you're going to get."

Q And you accepted that; right?

A **I had to. I was out of money.**

Q You did accept it; right?

A **I accepted the check and cashed it, yes. I had to.**

Q . . . The reason you had to accept it is, you knew that—if you pursued it with Bob MacDonald, that he had the right to terminate the contract and might exercise that right?

A **I always thought that, yes.**

Q And you didn't want it terminated because you were looking at the potential for the DLO business out into the future, up to possibly model year 2002?

A. Yes.

(Stehney, 150, Apx. 94b (emphasis added).) (*See also* Stehney, 151, Apx. 94b.)¹

Because Kelly-Stehney understood that MacDonald's had the right to terminate the contract with Kelly-Stehney if it did not accept the terms of the DLO Agreement and would exercise that right, Kelly-Stehney accepted, without objection, nearly \$1.35 million in DLO commissions that MacDonald's paid according to the DLO Agreement's terms. (Stehney II, 80–81, Chart, Apx. 106b-107b; 139b.)

VI. In June 1999, Kelly-Stehney Admits in Writing That It Had Previously Accepted MacDonald's Offer and the Terms of the DLO Agreement.

In a June 1999 letter, near the end of the second year of the DLO production and reduced commissions, Kelly-Stehney admitted that it had “been most accommodating and flexible in yielding to [MacDonald's] requests for adjusting [Kelly-Stehney's] commissions over the past several years on the DLO program.” (Letter, Apx. 132b-133b (emphasis added).) As of the date of that letter, MacDonald's had been paying Kelly-Stehney DLO commissions at a fixed \$21.86 base price for two years and at the reduced 2% commission rate for MY 1999 for

¹ In its brief, Kelly-Stehney quotes pages 148-150 of Stehney's deposition, but omits this exchange, thereby leaving a misimpression of the testimony. *See* Appellant's Brief, p 15.

approximately 10 months. (Stehney, 154–155, Apx. 95b.) Kelly-Stehney deliberately “yielded” because it knew that MacDonald’s could terminate Kelly-Stehney at any time and Kelly-Stehney “didn’t want to rock the boat.” (Stehney, 155–157, Apx. 95b-96b.) Kelly-Stehney wanted to prolong what it expected would continue to be a lucrative relationship with MacDonald’s with commissions potentially through June 2002. (Stehney, 157, Apx. 96b.)

In July 1999, Kelly-Stehney sent to MacDonald’s a letter questioning an \$11,000 (approx.) “adjustment” based on Kelly-Stehney’s independent audit of commissions over several months. (Letter, Apx. 135b.) Kelly-Stehney’s letter does not object to the DLO commissions during these months, which were paid at a 2% rate and \$21.86 base price. *Id.*

VII. Kelly-Stehney Admits That It Accepted MY 2000 Commissions Paid at a 1.5 Percent Rate and a \$21.86 Base Price.

Mr. Stehney testified that he spoke to Mr. MacDonald after Kelly-Stehney received the first commission check in which DLO commissions were paid at the MY 2000 rate of 1.5%. (Stehney, 159–160, Apx. 96b.) Mr. Stehney admitted that during this conversation he accepted the 1.5% rate and the \$21.86 base price:

Q Did you tell him, when you raised this issue, that you thought it was supposed to be 1.75?

A [Stehney] I said, “Where is the 1.75 Bob? How did you get to 1.5?”

Q And what did he say?

A **Nothing.**

Q He didn’t say anything?

A **Just like he did previously.**

Q What did you do?

A **Accept it.**

Q And you continued to accept the piece price of 21.86?

A **At that point, yes.**

Q And is it accurate to say that, after Exhibit 24, you would receive checks on a monthly basis that would show that the commission was paid at one-and-a-half percent on the DLO parts on a piece price of 21.86?

A **Could you say that again?**

Q Yeah. I'll be happy to. Exhibit 24 is the August check for commission starting in model year 2000.

A **Okay. Yeah.**

Q And I'm happy to show them all to you, and we can go through those. But I'll just ask you, to see if you recall. Do you recall that, in the checks that you received after the August '99 check, on a monthly basis, that there would be backup showing that the check was based in part on paying the DLO at a 1.5-percent commission rate?

A **Like I accepted everything in the past, I'm accepting this one, too, because Bob could not be reasoned with, and I didn't want to lose my commissions.**

Q So it is true, then, that the checks you received after August '99 reflected a 1.5-percent commission on DLO; right?

A **Yes.**

Q And reflected the 21.86 piece price?

A **Yes, it did.**

Q And you knew that?

A **Yes.**

Q And you accepted it?

A **I accepted it because I had to.**

Q Well, an alternative was for you to object and risk losing the whole contract?

A **That's exactly right.**

Q And your expectation at this time was that the contract would extend beyond a year; right?—the 12 months that you would be paid if the contract had been terminated?

A **I would say that's a safe assumption, yes.**

Q And the reason, then, why you decided not to pursue the matter with Bob was, you wanted to preserve the—at least your expectation of commissions out into the future?

A **I would say that's true.**

Q And it was your belief that those commissions could be substantial?

A **They were.**

(Stehney, 160–162, Apx. 96b-97b (emphasis added).)

VIII. Chrysler Prematurely Ends MacDonald's Role as Exclusive Supplier of the DLO Program and MacDonald's Terminates the DLO Agreement.

In May 1999, Chrysler notified MacDonald's that it would terminate MacDonald's as its exclusive supplier for the DLO Program and that the DLO business would be “re-sourced” and placed with a Canadian stamping manufacturer. (MacDonald, Sr., 132–135, Apx. 119b-120b.) This was a significant loss for MacDonald's. Five months after this notice, MacDonald's terminated Kelly-Stehney as its sales representative, effective February 7, 2000. (Stehney, Exhibit 30, Apx. 10a.)

MacDonald's paid Kelly-Stehney commissions for 12 months following the date of termination – until February 7, 2001 – in accordance with the MRA. (MacDonald, Sr., 81–83, Apx. 114b-115b.) These payments included DLO commissions until MacDonald's last shipment of DLO parts in July, 2000. (Answers, p. 9, Apx. 148b.) MacDonald's has paid over \$2.2 million in commissions to Kelly-Stehney. (Answers to Admissions, No. 2, Apx. 5b.)

IX. Five Months *After* Kelly-Stehney's Termination, Kelly-Stehney Objects to the DLO Agreement.

On May 31, 2000, 5 months after it was notified of its termination, Kelly-Stehney sent to MacDonald's a letter claiming that Kelly-Stehney had been "most accommodating in accepting partial payment for lower than stated commission rates outlined in our Manufacturer's Representative Agreement dated September 1, 1993." (Letter, Apx. 136b.) Stehney admitted that this letter was the first time that Kelly-Stehney ever told MacDonald's that it did not agree to the DLO Agreement terms, that it had accepted the \$1.35 million in DLO commissions paid by MacDonald's over MYs 1998-2000 only as a "partial payment," and that it was entitled to DLO commissions at a full 3% rate and \$27.50 base price per part. (Stehney, 152-153, Apx. 94b-95b; Stehney II, 28-29, Apx. 104b-105b; 45, Letter, Apx. 136b-138b.) In the May 31, 2000 letter, Mr. Stehney claimed that Kelly-Stehney had been underpaid by \$1,119,025. At his May 2001 deposition, Mr. Stehney increased that claim to \$1,438,445. (Chart, Apx. 46, Apx. 139b.)

X. It Is Undisputed That, If Kelly-Stehney Had Not Accepted the DLO Agreement, MacDonald's Could Have and Would Have Terminated Its Relationship with Kelly-Stehney in February 1997, and That MacDonald's Would Not Have Paid Kelly-Stehney Approximately \$1.75 Million in Commissions.

It is undisputed that MacDonald's was legally entitled to terminate its relationship with Kelly-Stehney as of February 1997 under the MRA, and that MacDonald's would have terminated Kelly-Stehney had Kelly-Stehney not agreed to the lower commission rates and the \$21.86 base price of the DLO Agreement. (Stehney, 146-149, 155-157, 160-162, Apx. 93b-97b; MacDonald, Sr., 81-83, Apx. 114b-115b; MacDonald Aff., ¶¶ 10,11, Apx. 3b.)

It is also undisputed that, had MacDonald's terminated its relationship with Kelly-Stehney as of that date, Kelly-Stehney's commissions from MacDonald's on the DLO business and all other accounts would have ended as of February 1998. (Stehney, 105-106, Apx. 83b; MacDonald Aff., ¶ 12, Apx. 3b.) Thus, had MacDonald's terminated Kelly-Stehney in February

1997, Kelly-Stehney would have only received approximately two months of DLO commissions—an amount totaling less than \$150,000. (*See* Answers to Admissions, No. 1, Apx. 5b; MacDonald Aff., ¶ 13, Apx. 3b.)

But, because MacDonald's agreed to continue its relationship with Kelly-Stehney under the terms of the DLO Agreement, MacDonald's paid to Kelly-Stehney approximately \$1.75 million in commissions (including DLO commissions) from February 1998 through February 2001. (*Id.* at ¶ 14, Apx. 3b-4b; Answers to Admissions, No. 1, Apx. 5b.)

XI. Kelly-Stehney's Lawsuit and the Trial Court's Opinion Granting MacDonald's Summary Disposition Motion.

On December 14, 2000, Kelly-Stehney filed a Complaint in Oakland County Circuit Court alleging breach of contract, misrepresentation, conversion, and statutory damages under Michigan's Sales Commissions Act, MCL 600.2961. (Complaint, ¶¶ 37–42.) Kelly-Stehney also alleged entitlement to commissions under the equitable doctrines of quantum meruit and promissory estoppel. In short, the Complaint alleges that Kelly-Stehney never agreed to the DLO Agreement and is entitled to DLO commissions at a 3% rate and a base price of \$27.50 (approx.) for MYs 1997–2000. Kelly-Stehney admits that it has been paid approximately \$1.35 million in DLO commissions according to the DLO Agreement terms (and \$1.75 million in total), but claims that MacDonald's still owes Kelly-Stehney an additional \$1.438 million in unpaid DLO commissions. (Stehney II, 80–81, Apx. 106b-107b, Chart, Apx. 139b.)

After the close of discovery, MacDonald's filed a Motion for Summary Disposition under MCR 2.116(C)(10) seeking dismissal of the Complaint. On October 17, 2001, the Trial Court granted the motion and dismissed Kelly-Stehney's claims. The Trial Court held that the DLO Agreement was enforceable, as a matter of law, because Kelly-Stehney assented to it and that it was not barred by the statute of frauds. The Trial Court also concluded that Kelly-

Stehney's efforts to circumvent the DLO Agreement were precluded by the doctrine of equitable estoppel. The Court explained:

THE COURT: All right. The Court has reviewed this matter at great length. I've read the briefs . . . I'm familiar with the contract – and the oral contract. I think the testimony is clear. I'm granting Defendant's motion for summary disposition, um, because the action is barred by the parties' subsequent oral agreement and I don't find that it is barred by the statute of frauds. The parties had a valid agreement for a reduced rate of commission and a reduced unit price, and Mr. Stehney very clearly testified that he had to accept it or Defendant was within its rights to terminate the relationship between the parties. Um, I think the Plaintiff is barred by equitable estoppel as well, and that's the decision.

(Transcript of Trial Court Opinion, p.17, Apx. 27b) (emphasis added).

XII. The Court of Appeals Affirms the Trial Court, Concluding that Michigan Law and the Undisputed Facts Bar Kelly-Stehney's Claims For Commissions.

In November 2001, Kelly-Stehney appealed the Trial Court's Opinion as of right. In its brief opposing Kelly-Stehney's appeal, MacDonald's contended that the Trial Court properly dismissed Kelly-Stehney's claims as a matter of law because the undisputed, material facts established that Kelly-Stehney assented to the DLO Agreement, and that Kelly-Stehney was equitably estopped from denying the validity of the Agreement. MacDonald's also contended that Kelly-Stehney waived any claim that it may have had to commissions in excess of those already paid to Kelly-Stehney by MacDonald's. Finally, MacDonald's argued that the MRA could be orally modified and that the DLO agreement is not barred by the statute of frauds because: it was reduced to signed writings, the equitable estoppel doctrine applies, the parties have fully performed the Agreement, and Kelly-Stehney ratified the Agreement by its words and conduct.

On January 3, 2003, the Court of Appeals issued a nine page Opinion and Order (the “Opinion”) affirming the Trial Court. In the Opinion, written by Judge Zahra, the Court held that Kelly-Stehney assented to the terms of the DLO Agreement and that:

Looking at the totality of the factual circumstances, we conclude that under the current state of the law, there is no question that the equitable estoppel doctrine applies to this case and that the statute of frauds does not bar enforcement of the oral DLO agreement. [*Kelly-Stehney*, 254 Mich at 624-625, Apx. 39a (emphasis added).]

Despite its ruling that the law and undisputed facts, without “question,” required dismissal of Kelly-Stehney’s claims, in dicta the Court of Appeals posited:

We nonetheless question the wisdom of such judicially created exceptions to the statute of frauds as equitable estoppel, ratification, and part performance. Rather than deferring to the Legislature to address through the legislative amendment process any perceived inequity in the statute of frauds, Michigan courts have by judicial fiat created gaping holes in the statute of frauds which are inconsistent with the express language of the statute and the policy supporting it. . . .” [*Id.* at 614-615, Apx. 35a.]

Based on this dicta, Kelly-Stehney timely filed the instant Application for Leave to Appeal. In its Application, Kelly-Stehney did not dispute that the uncontested facts and current status of the law establish that Kelly-Stehney is equitably estopped, as a matter of law, from disputing its assent to the DLO Agreement. Kelly-Stehney, instead, asked this Court to reconsider one discrete legal issue – the continued viability of the equitable estoppel defense to the statute. (Application for Leave, ¶ 2).

STANDARD OF REVIEW

This Court reviews *de novo* decisions on motions for summary disposition. *First Public Corp v Parfet*, 468 Mich 101-04; 658 NW2d 477 (2003).

However, the scope of appeal is limited to the one issue raised by Kelly-Stehney in its Application: whether the equitable estoppel defense to the statute of frauds should be abolished.

LAW AND ARGUMENT

I. THIS COURT SHOULD NOT ABOLISH THE 300-YEAR-OLD EQUITABLE ESTOPPEL DEFENSE, WHICH BY MICHIGAN CONSTITUTION IS THE LAW OF THE STATE, BECAUSE THE LEGISLATURE HAS NEVER MANIFESTED AN INTENT TO ABROGATE IT AND BECAUSE THE DEFENSE IS NECESSARY TO PREVENT FRAUD, AS IN THIS CASE.

In this appeal, Kelly-Stehney asks this Court to “assess the viability” of the equitable estoppel defense to the statute of frauds and to “do away with it.” (Kelly-Stehney Brf., p. 8).

This Court should decline Kelly-Stehney’s request and affirm the Court of Appeals. The equitable estoppel defense is not a product of judicial legislation. It is not a principle of statutory interpretation. Rather, it is a common law rule which has existed for over 300 years. Under Michigan’s Constitution, the common law is the law of the State of Michigan. By Constitution, the Legislature can abrogate that law only by unequivocal mandate. Since 1847, when the statute was first enacted in Michigan, the Legislature has never manifested such an intent. Rather, Michigan jurisprudence has from its beginning consistently applied equitable estoppel to the statute of frauds.

Instead, this case is a textbook example of why the defense exists, has never been curtailed in over 300 years, and should continue to exist under the common law.

A. By Constitution, The Common Law in Effect at the Time the Michigan Constitution Was Adopted “Remains in Force” as the Law Of The State.

On January 26, 1837, Michigan became the twenty-sixth state. Two years before, Michigan held its first constitutional convention. The 1835 Constitution expressly provided that

“[a]ll laws now in force in the territory of Michigan, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the legislature.” *Fry v Equitable Trust Co*, 204 Mich 165, 168-69; 249 NW 619 (1933) (quoting Const 1835, sched §2). This Court construed the term “all laws” to include the “common law”:

[I]t is said, that if the action would lie at the common law, that law is not in force in this state as a means of civil remedy. This is a somewhat startling proposition to be seriously urged at this time, when this court, as well as the circuit courts, have been adjudicating common law actions upon common law rules and principles, since their organization under the state government; and also, the territorial courts had done so previously, from the organization of the territorial government under the acts of congress and the ordinance of 1787. It can require but a few moments’ consideration.

It is contended, first, that the state constitution abrogated the common law, which is conceded was previously in force. There is no provision in the constitution to that effect; but, on the contrary, in the second section of the schedule annexed to the constitution, the laws in force are retained until they should expire by their own limitations, or be altered or repealed by the legislature. And it is a general principle, that, upon a change of government, laws in force continue until changed or abrogated. But it is said that, if not repealed by the constitution, it is by the Revised Statutes of 1838. Not so. In the repealing acts therein contained, *the statutes* of which the subjects are revised or re-enacted . . . are repealed. And so far as the constitution and the government established by it, or the provisions of statutes, are inconsistent with, or repugnant to the common law, they supersede it. In almost every part of the Revised Statutes of 1838, relating to rights and remedies, the common law is incidentally or otherwise recognized. . . . [*Stout v Keyes*, 2 Doug 184,187-188 (1845) (emphasis added).]

All subsequent Constitutions – those of 1850, 1908, and 1963 – expressly recognize the common law as remaining in force and constituting part of the governing law:

. . . The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or

repealed. [Const 1963, art 3, ¶ 7 (incorporating same language as Const 1908, sched § 1 and Const 1850, sched §1.]]

In 1860, this Court explained the importance of the common law to the state's jurisprudence:

Practically the common law has prevailed here, in ordinary matters, since our government took possession; and the country has grown up under it. . . . A custom which is as old as the American settlements, and has been universally recognized by every department of government, has made it the law of the land, if not made so otherwise. Our statutes, without this substratum, would not only fail to provide for the great mass of affairs, but would lack the means of safe construction. [*Lorman v Benson*, 8 Mich 18, 1860 WL 4665, *5 (1860).]

Thus, by Constitution, the common law as it existed in 1835, 1850, 1908 and 1963 remained in force. *Beech Grove Inv Co v Civil Rights Comm*, 380 Mich 405, 430; 157 NW2d 213 (1968). And it continues to be the law that courts must administer, unless it is expressly changed by the legislature. *Bassier v J Connelly Const Co*, 227 Mich 251, 257; 198 NW 989 (1924).

Because, by Constitution, the common law is accorded equal weight and authority with statutory law, both sources of law must be construed in harmony to the extent possible. *Energetics, Ltd v Whitmill*, 442 Mich 38, 51; 497 NW2d 497 (1993). Thus, courts must interpret statutes with reference to the common law, and give statutes their common law meaning where there is no express indication to the contrary. *Mayhall v A H Pond Co*, 129 Mich App 178, 182; 341 NW2d 268 (1983); *People v Young*, 418 Mich 1, 13; 340 NW2d 805 (1983), *app after remand* 425 Mich 470; 391 NW2d 2701 (1983).

Courts must also presume that the Legislature had knowledge of the common law rules when enacting statutes. *State Dep't of Treasury v Campbell*, 107 Mich App 561, 568; 309 NW2d 668 (1981), *app after remand* 161 Mich App 526; 411 NW2d 722. And courts may not presume that the legislature intended to change the common law. Rather, change is not "lightly

presumed”; it must be express. *Bandfield v Bandfield*, 117 Mich 80, 82; 72 Am St Rep 550 (1898); *Hasty v Broughton*, 133 Mich App 107, 113; 348 NW2d 299 (1984); *Silver v Internat’l Paper Co*, 35 Mich App 469, 472; 192 NW2d 535 (1971). Thus, courts must narrowly construe statutes that abolish the common law. *Sibley v Smith*, 2 Mich 486 (1853); *Kinnunen v Bohlinger*, 128 Mich App 635, 639; 341 NW2d 167 (1983). See also *Donajkowski v Alpena Power Co*, 460 Mich 243, 256, n 14; 596 NW2d 574 (1999), *app after remand Duranceau v Alpena Power Co*, 250 Mich App 179; 646 NW2d 872 (2002) (recognizing rule of construction requiring narrow interpretation of laws abridging common law as a “venerable rule”).

This Court summarized these rules and the reason for them:

In 12 C. J. p. 178 it is said: ‘The unwritten or common law is the embodiment of principles and rules inspired by natural reason, an innate sense of justice, and the dictates of convenience, and voluntarily adopted by men for their government in social relations. The authority of its rules does not depend on positive legislative enactment, but on general reception and usage, and the tendency of the rules to accomplish the ends of justice.’

This court has on many occasions applied the rules of the common law in cases before it when the matter in dispute was not specifically controlled by a constitutional or statutory provision. These rules are firmly embedded in our jurisprudence, and it is presumed that the Legislature had them in mind when enacting statutes. . . . Chancellor Kent in his Commentaries (vol. 1,464) says: ‘Statutes are likewise to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. This has been the language of the courts in every age; and when we consider the constant, vehement, and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason, and the best birthright and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction.’

And: ‘If by interpretation they’ (the common law and the statutes) ‘may stand together, they shall so stand.’ Smith’s Commentaries, p. 879, § 757.

Garwols v Bankers Trust Co, 251 Mich 420, 423-424; 232 NW 239 (1930).

Thus, by Constitution, statutes must be harmonized with the common law, absent manifest legislative intent to change the common law.

B. The Common Law Includes English Statutory and Common Law, And Equitable Principles, Including Equitable Estoppel.

The common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. [*Semmens v Floyd Rice Ford, Inc*, 1 Mich App 395, 399; 136 NW2d 704 (1965)] [citations omitted].

* * *

The common law, as frequently defined, includes those rules of law which do not rest for their authority upon any express or positive statute or other written declaration, but rather upon statements of principles found in the decisions of the courts. Common law is the law of necessity. . . .

* * *

To the early writers on English law, the common law meant those rules which by custom, usage, and court decision, and not by act of Parliament, had come to be recognized as the law of the land. . . . [15A Am Jur 2d, Common Law, § 1, pp 564-65 and n 2.]

Michigan's common law includes English statutes (enacted before the emigration of the American colonists) and English common law. *Lorman, supra*; *Stout, supra*; *In re Lamphere*, 61 Mich 105; 27 NW 882 (1886); *In re Sanderson*, 289 Mich 165; 286 NW 198 (1939) (common law included English statutes of general operation). *See also* 15A Am Jur 2d, Common Law, §§ 3- 7. It also includes the principles of equity. *Late Corporation of the Church of Latter-Day Saints v United States*, 136 US 1; 10 S Ct 792; 34 L Ed 478 (1890); *Vidal v Griad's Ex'rs*, 43 US 127; 2 How 127; 11 L Ed 478 (1844); Am Jur 2d, *supra* §§ 6, 7 (citing cases) ("the term common law includes those doctrines of equity jurisprudence which have not been expressed in legislative enactments").

Thus, to ascertain the common law, Michigan courts look not only to their own decisions, but also to decisions of the English courts and to decisions of other states in the Union. Am Jur 2d, *supra* § 4 (citing authority).

As shown below, from 1699 – soon after the first statute of frauds was enacted in England – until the present, the common law has recognized, and Michigan courts have applied, the equitable estoppel defense to the statute where necessary to prevent fraud.

C. Shortly After England Enacted The First Statute of Frauds, English Courts Recognized The Equitable Estoppel Defense.

In 1677, England enacted the statute of frauds. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 Fordham L Rev 39, 39 (1974). The fourth of 25 sections prohibited lawsuits based on oral promises: “no action shall be brought . . . upon any agreement that is not to be performed within the space of one year from the making thereof. . . .” *Id.* at n 2. *See also* 4 Corbin, Contracts, § 12.1, p 5.

Its purpose was to “protect[] defendants from fraudulent claims.” Corbin, *supra* at p 4. *See also* 9 Williston & Lord, A Treatise on the Law of Contracts (4 ed), § 12:1, p 171. But shortly after the statute’s enactment, courts and the legislature recognized that it was a technical defense that often ran counter to the merits: “Such gain in the prevention of fraud as is attained by the statute is achieved at the expense of permitting persons who have in fact made oral promises to break those with impunity and to cause disappointment to honest folk.” Corbin, *supra* at p 6. In 1954, England repealed all but two provisions in section four without any discernable adverse effects. *Id.* at p 5. The repealed provisions included the provision regarding contracts incapable of performance within one year. *Id.*

Shortly after the statute’s enactment, courts of equity recognized exceptions and defenses to the statute in order to “attain the chief purpose of the statute” and prevent it from

“perpetrating more fraud and injustice than it prevented.” Corbin, *supra* at § 12.7, pp 29-30. Thus, equity enforced oral contracts when necessary to prevent injustice. *Id.* at p 30. *See also* Williston, *supra* at § 27.16, pp 142-150. “Where the doctrine of part performance did not apply. . . earlier efforts to bar assertion of the statute found support primarily in the doctrine of equitable estoppel.” *Id.* at § 12.8, p 36.

The equitable estoppel defense “is as old as the statute of frauds, and, as such, a part of the law of the land.” *Taylor & Mason v Zepp*, 14 Mo 482; 1851 WL 4090, * 8 (1851) (applying defense and citing Missouri precedent). It can be traced back to a 1699 chancery decision, *Mullet v Halpenny*, Prec in Ch 404 (Eng, 1699) (discussed in Pound, *Progress Of Law, Equity*, 33 Harv L Rev 929, 937 (1918-19)). The equitable estoppel defense is based

[U]pon the principle established in equity, and applying in every transaction where the Statute is invoked, that the Statute of Frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme. It is called into operation to defeat what would be an unconscionable use of the Statute, and guards against the utilization of the Statute as a means for defrauding innocent persons who have been induced or permitted to change their position in reliance on oral agreements

Under circumstances of th[at] kind [], it is universally agreed that the doctrine of equitable estoppel may be invoked to preclude a party to a contract from asserting the unenforceability of a contract by reason of the fact that it is not in writing as required by the Statute. In other words, the Statute of Frauds may be rendered inoperative by an estoppel *in pais*. The Statute was designed as a weapon of the written law to prevent frauds; the doctrine of [equitable] estoppel is that of the unwritten law to prevent a like evil. [Williston, *supra* at § 27.16, pp 142-150 (emphasis added). *See accord* 2 Pomeroy, *Equity Jurisprudence*, § 921 (1882).]

Thus, the defense provides where:

. . . one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is

precluded from averring against the latter a different state of things as existing at the time.” [*Pickard v Sears*, 6 A & E 474 (Eng, 1837).]

By the early nineteenth century, the defense was well-established in the law. It was described in English jurisprudence as a “very old head.” *Evans v Bicknell*, 6 Ves 183 (Eng, 1801). Pomeroy described it as being adopted by the common law “at a very early day” and being “incorporated into the law, and [] constantly employed by the courts of law . . . in decision of legal controversies.” *Pomeroy, supra* pp 258-259. He explained that the defense and statute developed side-by-side in the law, because it “does not deny or overrule the statute; but it declares that fraud or mistake creates obligations and confers remedial rights which are not within the statutory prohibition; in respect of [the defense], the statute is uplifted.” *Pomeroy, supra* at § 867; *see also, id.* at n 3. *See also*, Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U Pa L Rev 440, 445 (1930-1931) (recognizing that present-day courts and practically unanimous in applying estoppel to validate contracts unenforceable under the statute of frauds); Browne, *Statute of Frauds* (1857), pp 432-437.

D. Equitable Estoppel Was Part Of Michigan Common Law When The State Adopted The 1835 Constitution And In 1846 When It Enacted Its First Statute Of Frauds.

Michigan enacted its first statute of frauds in 1846. It was based on the British act. In relevant part, the statute provided: “[e]very agreement that, by its terms, is not to be performed in one year from the making thereof” is void. RS 1846, c 81, § 2.

The statute has been amended 12 times. But there has been no substantive change to the one year provision.² It now provides: “An agreement that, by its terms, is not to be performed in 1 year from the making of the agreement” is void. MCL 566.132(1)(a)

By the time that the statute was enacted – just eleven years after the adoption of the 1835 Constitution – the equitable estoppel defense to the statute was well-established in English common law, as explained in Section C above. And that was part of the common law which the 1835 Constitution required “remain in force.”

In addition, other states had applied the equitable estoppel defense. In 1823, Kentucky’s highest appellate court applied equitable estoppel, finding that the statute of frauds did not bar recovery of monies owed on an oral contract to take land in satisfaction of a debt. *Springle and Bobb’s Heirs v Morrison*, 13 Ky 52; 1823 WL 1118, *3 (1823). The court stated that the defense is “founded on good reason, and is abundantly supported by authority . . . nor is it in conflict with the statute against frauds in perjuries, as is contended on the part of Morrison; for the statute only prohibits the enforcement of an equity derived from a verbal contract for land, and cannot be construed to apply to an equity resulting from the fraudulent or wrongful conduct of a party.” *Id.*

The Supreme Court of Connecticut applied the defense to the statute of frauds in what it considered to be the quintessential case of equitable estoppel in *Brown v Wheeler*, 17 Conn 345; 1845 WL 464 (1845). The Court cited authority recognizing the defense and maintained that “cases are numerous in this country, where a person has asserted a fact, upon faith of which another acts, and will receive damage, if that fact is not true, where it has been

² See CL 1857, § 3183; CL 1871, § 4698; How, § 6185; CL 1897, § 9515; 1913 PA 238; CL 1915, § 11981; CL 1929, § 13417; 1945 PA 261; CL 1948, § 566.132; CL 1970, § 566.132; 1974 PA 343, § 1; and 1992 PA 245, § 1.

held, that he shall be estopped from contradicting it.” *Id.* at *7. The Court applied the defense to preclude the plaintiff from denying an agreement that he had acquiesced in 16 years earlier finding that “[a]ny other construction would enable the party to perpetrate a most gross fraud.” *Id.* at *8.

E. Common Law Continued To Apply The Equitable Estoppel Defense To The Statute of Frauds From 1850 Through 1908, When Michigan Adopted Its Third Constitution.

Michigan courts continued to recognize and apply the equitable estoppel defense from 1850 through 1908, when Michigan adopted its third Constitution.³ That Constitution, like its predecessors, provided that the common law in effect at the time continued to be the law of the land.

This Court applied the defense in *Truesdail v Ward*, 24 Mich 117, 1871 WL 5644 (1871), an action for specific performance. There, the plaintiff defaulted on a written contract for the sale of “four sections of pine land in Lapeer.” *Id.* at *1. Plaintiff “acquiesced” in the default and termination of the sales contract. Several months later, defendant sold the property to another party. Five months after the sale, plaintiff filed a lawsuit to enforce his contract. This Court affirmed summary dismissal of the claim based on equitable estoppel. The defense applied because the plaintiff “studiously withheld,” “carefully withheld” and “concealed” his claim so “as to lead the defendant to believe that he acquiesced in the act of forfeiture.” *Id.* at *6 and *9. In so holding, the Court noted the “great number of cases of high authority, and founded in the clearest justice” applying the defense. *Id.* at *9.

³ The only noted exception to the equitable estoppel defense in Michigan law is that titles to land cannot be established on the basis of estoppel; an oral promise for such an interest will be barred by the statute. *Huyck v Bailey*, 100 Mich 223, 226; 58 NW 1002 (1894); *Kitchen v Kitchen*, 465 Mich 654, 660; 641 NW2d 245 (2002).

This Court applied the defense again in *Faxon v Faxon*, 28 Mich 159, 1873 WL 3075 (1873). *Faxon* was a foreclosure action based on mortgages executed in 1847 and 1849. The plaintiff was the defendant-Josiah's half-uncle. Josiah contended that his uncle was equitably estopped from foreclosing, because his uncle had promised Josiah that he would never foreclose if Josiah remained on the land and cared for it and Josiah's family. This Court held that the uncle was equitably estopped to deny the promise, recognizing:

There is no rule more necessary to enforce good faith than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on. The rule does not rest upon the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect. [*Id.* at * 2.]

Justice Cooley concurred in the decision, recognizing that the uncle's assurances induced reasonable and prejudicial reliance by Josiah. *Id.*

In *Campau v Shaw*, 15 Mich 226; 1867 WL 1779 at *8 (1876), this Court recognized in dicta the potential for an equitable estoppel defense to the statute of frauds if the defendant-real property lessees had knowingly and silently allowed heirs of the lessor to make expensive improvements without a written instrument to confirm the lease.

Later, this Court applied the defense to preclude assertion of the statute in *Jones v Pashby*, 67 Mich 459, 462; 35 NW 152 (1887) (oral agreement regarding a boundary line acquiesced in for years would act as an estoppel), and in *Haak v Kellogg*, 146 Mich 541, 543; 109 NW 1068 (1906) (defendant estopped from invoking statute to bar oral lumber purchase agreement).

During this period, the U.S. Supreme Court also applied equitable estoppel to prevent resort to the statute of frauds. In *Swain v Seamens*, 76 US 254, 9 Wall 254, 19 L Ed 554

(1869), the defendant-mortgage holder was equitably estopped in an action to cancel a mortgage, despite Wisconsin's statute of frauds. *Swain* involved a sale of land located in Michigan. The sale was secured by a "second" mortgage on land and a sawmill located in Wisconsin. *Id.* at 260. The plaintiff claimed that the second mortgage was satisfied and should be cancelled, because the defendant had acquiesced in changes to the mill dimensions stated in the written contract. The defendant pled the statute of frauds as an affirmative defense. The Court held that estoppel was a "complete defense" to the statute. *Id.* at 273-74, n 9 (citing precedent). It reasoned:

Taken as a whole, the proofs satisfy the court that [defendant's] conduct and declarations let [plaintiffs] believe that [defendant] was content with the change made, and that he would readily acquiesce in their doings when the mill was completed, and, if so, he cannot be heard to allege or prove the contrary to the prejudice of their rights.

Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such an adversary claim. [*Id.* at 274 (citations omitted).]

Ten years after *Swain*, the Supreme Court characterized the equitable estoppel defense as a "vital principle" based on "well settled" law. *Dickerson v Colgrove*, 100 U.S. 578, 580; 10 Otto 578; 25 L Ed 618 (1879). In *Dickerson*, the Court affirmed summary dismissal of an ejectment action based on the defense and despite Michigan's statute of frauds. *Id.* at 581-84 (citing the Michigan cases of *Faxon* and *Truesdail* above). The Court explained:

... he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It

accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in limitation of actions, and does its work of justice and repose where the statute cannot be invoked. [*Id.* at 580-81].

F. The Common Law Continued To Recognized The Equitable Estoppel Defense From 1908 Until Michigan Adopted The 1963 Constitution, And Thereafter.

The equitable estoppel defense to the statute of frauds was repeatedly recognized in Michigan common law between the time of the 1908 and 1963 Constitutions.

This Court applied the defense in *Hartz v Kales Realty Co*, 178 Mich 560, 564; 146 NW 160 (1914), to estop a defendant from disclaiming an oral agreement regarding deed restrictions, and it applied the defense to enforce an oral lease and service contract in *Thompson v Hurson*, 201 Mich 685, 694-95; 167 NW 926 (1918). It also recognized equitable estoppel and part performance as complete defenses to the statute in a case involving an oral agreement for a two year tenancy and right of purchase, stating “[m]isleading, fraudulent conduct by act or acquiescence is the underlying thought which moves the chancery court under the principle of equitable estoppel to deny resort to the statute of frauds as an instrument of fraud.” *Lyle v Munson*, 213 Mich 250, 260; 181 NW 1002 (1921). See accord, *Stevens v De Bar*, 229 Mich 251, 255-56; 200 NW 978 (1924) (estopping attack on oral conveyance after execution and ratification by the defendant) (reviewing and citing authority); *Colonial Theatrical Enterprises v Sage*, 225 Mich 160, 170-71; 237 NW 529 (1931) (same); *Colonial Brick Co v Zimmerman*, 255 Mich 655, 657; 239 NW 301 (1931) (holding plaintiff estopped from asserting the statute and stating “where a party asks a court of equity to enforce a contract for his benefit, he is estopped from claiming it is invalid under the statute of frauds to the disadvantage of the other party”); *Spitzley v Holmes*, 256 Mich 559, 563-64; 240 NW 81 (1932) (holding defendant estopped from asserting the statute and stating “[w]e have repeatedly held in many cases, some presenting not

as strong equities. . . , that misleading conduct on the part of an owner will estop him from asserting a different title than the instruments purport to convey”).

In 1932, this Court also applied the defense to enforce an oral modification of a lease, in a case which is similar to this one. *See Zannis v Freud Hotel Co*, 256 Mich 578; 240 NW 83 (1932). In *Zannis*, the parties entered into a written lease agreement that required the defendant to incur substantial expense remodeling the leased space for use as a coffee shop. When the time came for such remodeling and for plaintiff to move into the coffee shop, the parties orally agreed to forego the move. Defendant saved on the remodeling expenses. In return, plaintiff was permitted to lease the coffee shop space and the entire dining room space with no additional changes. *Id.* at 582. Five months into the oral agreement, plaintiff changed its mind and decided it would move and demanded the remodeling. The plaintiff filed suit when the defendant refused to make the improvements, based on the oral agreement. *Id.* at 583. The jury returned a verdict of no-cause and this Court upheld the verdict, holding that the plaintiff was equitably estopped from denying the oral modifications, despite the statute of frauds:

While the law of this State has consistently held that an agreement required by the statute of frauds to be in writing may not be substantially altered by a verbal agreement, it has also held that parties may not accept the benefits from such alteration and then claim that the transaction is void. In *Barton v Gray*, 57 Mich 622, we said:

‘. . . . No person can complain of an injury caused by the act or conduct of a party to which he has consented; and no one who causes or sanctions the breach of an agreement can recover damages for its nonperformance. . . .’

* * *

‘The statute of frauds may not be used to perpetrate a fraud. One cannot take advantage of his own wrong. One may not so speak and act as to knowingly induce another to change his position, and then avail himself of that change to his prejudice.’

* * *

. . . . While the precise question in its identical form has not been passed upon by this court, the theory of estoppel has been frequently recognized and parties have not been permitted to escape their obligations when they have stood by and acquiesced or received a consideration from contracts that they subsequently seek to avoid because they do not conform with the statute of frauds. [*Id.* at 585-86 (emphasis added) (citations omitted).]

By 1956, this Court recognized the estoppel defense as being “long recognized in Michigan courts.” *Ollig v Eagles*, 347 Mich 49, 63-64; 78 NW2d 553 (1956) (holding that defendant’s silence as to his title and his acquiescence and assistance in plaintiff’s construction of a house on the property estopped his “legal defense” based on the statute of frauds).

In more recent years, the Michigan Courts have continued to apply the equitable estoppel defense to preclude application of the statute of frauds. The Court of Appeals held that the defense barred a defendant-landowner from asserting the statute of frauds to defeat the sale of certain of his subdivision lots, where he had received regular reports from real estate brokers about the land sale and, by his silence, acquiesced in the sale. *Jaye v Tobin*, 42 Mich App 756, 759-60; 202 NW2d 712 (1972). Michigan Courts also applied the defense in: *Pursell v Wolverine-Pentronix, Inc.*, 44 Mich App 416, 420; 205 NW2d 504 (1973) (finding that the equitable estoppel defense to the statute precluded summary dismissal and remanding to the trial court); *White v Production Credit Ass’n of Alma*, 76 Mich App 191, 194-95; 256 NW2d 436 (1977) (finding that the defense applied where plaintiff detrimentally relied on the oral financing agreement by constructing an irrigation system); *Conel Development, Inc v River Rouge Savings Bank*, 84 Mich App 415, 423; 269 NW2d 621 (1978) (finding that equitable estoppel circumvented bank’s statute of frauds defense); *Lovely v Dierkes*, 132 Mich App 485, 490; 347 NW2d 752 (1984) (estopping employer from raising statute of frauds defense to a three-year employment contract); *Nygaard v Nygaard*, 156 Mich App 94, 99; 401 NW2d 323 (1986) (finding

that the equitable estoppel defense to the statute could be asserted to enforce child support agreement); and *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517, 527; 644 NW2d 765 (2002) (allowing the defense to be wielded as a “sword and not as a shield” and remanding action to quiet title).

Michigan common law applying the defense to the statute is in accord with the law of other jurisdictions. Several sections of the Restatement of Contracts recognize the equitable estoppel defense to the statute of frauds. *See* Restatement Contracts, 1st, § 197; Restatement Contracts, 2d, §§ 129, 139. In 1932, the Restatement of Contracts specifically recognized the application of the defense to an oral modification of a written contract. *See* Restatement Contracts, 1st, § 224:

The performance of a condition qualifying a promise in a contract within the Statute may be excused by an oral agreement or permission of the promisor that the condition need not be performed, if the agreement or permission is given while performance of the condition is possible, and in reliance on the agreement or permission, while it is unrevoked, the promisee materially changes his position.

That section was revised in 1981 to provide:

Where the parties to an enforceable contract subsequently agree that all or part of a duty need not be performed or of a condition need not occur, the Statute of Frauds does not prevent enforcement of the subsequent agreement if reinstatement of the original terms would be unjust in view of a material change of position in reliance on the subsequent agreement. [Restatement Contracts, 2d, § 150.]

While there are no reported Michigan decisions citing the provisions, other jurisdictions have referenced them in enforcing oral modifications. *See Catoe v Knox*, 709 P2d 964 (Col Ct App, 1985) (holding that an oral modification to a land contract was enforceable based on detrimental reliance, including payment of interest and obtaining variances on the property); *Medina v Sunstate Realty, Inc.*, 889 P2d 171 (NM, 1995) (accord); *220 West*

Apartments v Foreman, No 66107, 1994 WL 505271 (Ohio, 1994) (accord) (attached at AD3-AD6).

G. This Court Should Continue To Recognize The Common Law Equitable Estoppel Defense Because The Legislature Has Never Manifested An Intent To Abolish It.

By Constitution, the common law stands on equal footing with statutory law. Thus, abrogation of the common law by the Legislature is never presumed or inferred. *Wales v Lyon*, 2 Mich 276 (1851). In *Wales* – decided the year after the enactment of the state Constitution – this Court stated:

. . . [s]tatutes are to be construed in reference to the common law, and it is never to be presumed that the legislature intended to make any innovation upon the common law any further than the case absolutely required in order to carry the act into effect. . . . This is the only safe rule to adopt in the construction of statutes. [*Id.* at 283.]

The Court explained the legal basis for the high burden to prove abrogation of the common law, quoting Chief Justice Marshall: “where rights are infringed, where fundamental principles are overthrown, where the general system of the law is departed from, the legislative intention must be expressed with *irresistible clearness*, to induce a court to suppose a design to effect such object.” *Id.* at 286 (citing *United States v Fisher*, 2 Cranch 358) (emphasis in original).

Thus, Legislative intent to abrogate the common law must be manifest in the language of the statute:

[i]t is not to be presumed that the Legislature intended to abrogate or modify the rule of the common law by the enactment of a statute upon the same subject; it is rather to be presumed that no change in the common law was intended, unless the language employed clearly indicates such an intention. [*Butler v Grand Rapids*, 273 Mich 674, 679; 263 NW 767 (1935) (emphasis added).]

See accord Nummer v Treasury Dep’t, 448 Mich 534, 545-47; 533 NW2d 250 (1995) (Riley, J) (applying rule to reverse lower court and hold that plaintiff’s discrimination claim was barred by

common law preclusion rules under Michigan's Civil Rights Act, MCL 37.2102 *et seq.*); *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 508; 309 NW2d 163 (1981) (applying rule to interpret Michigan's no-fault automobile insurance act as not abrogating the common law loss of consortium claims); *Kefgen v Davidson*, 241 Mich App 611, 619, n 9; 617 NW2d 351 (2000) (Zahra, J, joined by Saad and Gage, JJ) (applying rule in dicta to interpret Michigan's libel statute and finding that the statute "codified" the common law standard of proof). *See also United States v Texas*, 507 US 529; 113 S Ct 1631; 123 L Ed 2d 245 (1993) (Rehnquist, J) (joined by White, Blackmun, O'Connor, Scalia, Kennedy, Souter, Thomas) (holding that the Debt Collections Act did not abrogate common law regarding prejudgment interest).

In this case, the burden of proving legislative intent with "irresistible clearness" is born by Kelly-Stehney, the party advocating for abrogation of the firmly-rooted common law defense. *Green v Bock Laundry Mach Co*, 490 US 504, 521; 109 S Ct 1981; 104 L Ed 2d 557 (1989). It is a burden that Kelly-Stehney cannot shoulder, because the Legislature has never manifested an intent to abolish the defense.

That the statute and common law should be read together is supported by *Garwols*, 251 Mich 420 (1930). There, this Court precluded an illegitimate child from inheriting land from his mother, because he murdered her. The Court so ruled despite a statute providing, without exception: "[e]very illegitimate child shall be considered as an heir of his mother, and shall inherit her estate, in like manner as if born in lawful wedlock." *Id.* at 422 (emphasis added). Citing the Michigan Constitution, *Wales*, and numerous other precedents, the Court held that the statute had to be read in conjunction with the common law equitable principle that proscribed a devisee from inheriting if his criminal act caused the devisor's death, "which have so long had place in our jurisprudence." *Id.* at 429. The Court reasoned:

It is not here sought to engraft a provision of the common law upon this statute. But we read the statute and then, in the light of the rule of the common law preventing murderers from inheriting, conclude that the legislature must have had this disqualification in mind at the time of its adoption.

The statute is in general terms, and controls the descent and distribution of property under normal conditions. It does not provide that a son who murders his mother shall inherit her property. It cannot be conceived that the legislature had in mind so shocking a result in its enactment. [*Id.* at 429.]

The “plain language” of the statute of frauds does not preclude the equitable estoppel defense, because the statute and the defense are not mutually-exclusive or antagonistic. They are applied “side by side in the law, . . . for the ultimate purpose of preventing fraud and injustice.” *Ozier v Haines*, 411 Ill 160, 165; 103 NE2d 485 (1952). As set forth in an 1851 Missouri Supreme Court case:

The doctrine of estoppel is as old as the Statute of Frauds, and, as such, a part of the law of the land. It is no objection to either, that the one may be a modification or regulation of the other. [*Taylor & Mason*, 1851 WL at *8.]

Indeed, Michigan courts have never held that the Legislature had manifested an intent to abolish either the defense, or the judiciary’s inherent equitable powers in applying the defense, in their 156 years of interpreting the statute.⁴ See *Califano v Yamasaki*, 442 US 682, 705; 99 S Ct 2545; 61 L Ed 2d 176 (1979) (absent “clearest command” from the Legislature, the

⁴ In *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538, 548; 619 NW2d 66 (2000), the Court of Appeals “questioned” the “viability” of promissory estoppel as a cause of action in light of the statute of frauds. But that is an entirely different legal doctrine. See *Hoye v Westfield Ins Co*, 194 Mich App 696, 704; 487 NW2d 838 (1992). The Court did not address equitable estoppel. Nor did it abrogate the doctrine of promissory estoppel. *Crown*, *supra* at 548, n 4. Instead, the *Crown* Court held that the plaintiff’s claim to enforce an alleged oral promise regarding refinancing of a loan was barred by the 1992 amendment to the statute, which expressly precludes “actions” based on specific types of oral promises made by financial institutions. *Id.* at 549-553 (discussing the 1992 amendment to the statute, which adds MCL 566.132(2), and was enacted to respond to an “apparent problem in the banking industry”). Significantly, the Legislature did not amend the provision at issue in the instant case in 1992, nor did it express any intent then or ever to abolish the equitable estoppel defense to the statute.

Judiciary retains its powers to afford equitable relief). Instead Michigan courts have consistently applied the equitable estoppel defense to the statute.

Kelly-Stehney's reliance on *People v McIntire* is entirely misplaced. 461 Mich 147; 599 NW2d (1999). (See K-S Brf., pp. 9-12). In *McIntire*, this Court reversed the lower court's interpretation of a statute (MCL 767.7) providing for immunity in exchange for grand jury testimony. This Court held that the text of the statute was "clear and unambiguous" on its face and "simply does not condition transactional immunity on truthful testimony." *Id.* at 154. In so holding, this Court renounced the "absurd result rule," a so-called "rule" of statutory construction. The Court agreed with Justice Scalia's characterization of the "rule" as "nothing but an invitation to judicial lawmaking." *Id.* at 155, n 8 (quoting Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton Univ. Press, 1997), p 21).

The Court's holding in *McIntire* and Justice Scalia's observation are inapplicable in this case. The "absurd result rule" is a tool of statutory construction, which recognizes that "[i]f a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity." *Rector of Holy Trinity v United States*, 143 US 457, 460; 12 S Ct 511, 36 L Ed 226 (1892). It permits a court to interpret a statute, not based on the express language, but on the court's own belief as to the Legislature's true intent "despite the language it used." *McIntire*, *supra* at 156. The rule is used to "infer" unexpressed legislative intent. *Id.*

That is not the issue in this case. This case is not about statutory construction. It is about the interrelationship between the common law and statutory law, the long jurisprudential history recognizing both equitable estoppel and the statute of frauds, and the constitutional requirement that the two be read together.

H. If The Court Changes The Law, Its Ruling Should Be Prospective Only.

This Court recently confirmed that it does not “lightly overrule precedent.”

Pohutski v Allen Park, 465 Mich 675, 693; 641 NW2d 219 (2002). It explained:

Stare decisis is generally “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” . . . Before we overrule a prior decision, we must be convinced “not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it.”

* * *

At the same time, we must also remember that *stare decisis* is a principle of policy, not an inexorable command. *Stare decisis* should not be applied mechanically to prevent this Court from overruling erroneous decisions regarding the meaning of the statute. [*Id.* at 693-694] [citations omitted].

In *Pohutski*, the court identified four factors to consider before overruling precedent: (1) whether the earlier case was wrongly decided, (2) whether the decision defies “practical workability,” (3) whether reliance interests would work an undue hardship, and (4) whether changes in the law or facts no longer justify the questioned decision. *Id.* at 694. The reliance factor requires leaving precedent undisturbed where “the previous decision has become so embedded, so accepted, so fundamental, to everyone’s expectations that to change it would produce not just readjustments, but practical real-world dislocations.” *Id.* at 694 (quoting *Robinson v Detroit*, 462 Mich 439, 466; 613 NW2d 307 (2000)).

Here, these factors weigh heavily against overruling the common law defense. First, there has been no contention that 300 years of decisions applying the defense are wrongly decided. It is Kelly-Stehney’s assault on the common law rule that is in error. Its attack confuses the principles of statutory construction (the absurd result rule) with the common law rules of law (equitable estoppel). Second, the defense is workable and is still necessary. People are still

human. They make bad bargains and attempt to avoid them, sometimes at another's expense. Third, after 300 years of application, the defense is "so embedded" and "so fundamental" that its abrogation would produce "practical real-world dislocations." MacDonald's, for one, would stand to lose millions to Kelly-Stehney if Kelly-Stehney were permitted to disclaim the DLO Agreement -- according to which MacDonald's has already paid \$1.75 million in commissions, which MacDonald's would not have said had Kelly-Stehney not misled it. Overruling the defense is not only unwarranted, it would be manifestly unfair in this case.

If the Court does effect a change in the law, however, that change should be prospective only. Although the general rule is that judicial decisions are given retroactive effect, a more flexible approach is warranted where injustice might result from full retroactivity. *Pohutski, supra* at 695-96.

Three factors determine whether retroactive or prospective application is appropriate: (1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule; and (3) the effect of retroactivity on the administration of justice. *Id.* at 696 (citing *Linkletter v Walker*, 381 US 618, 85 S Ct 1731, 14 L Ed 2d 601 (1965)). An additional "threshold question" is whether the decision clearly establishes a new principle of law. *Id.* (citations omitted). This Court has recognized that prospective application is particularly appropriate where a holding overrules "settled precedent." *Id.* (citing *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997)).

Here, the same reasons that preclude a change in the law require that any change be prospective only. In *Pohutski*, this Court determined that prospective application of its interpretation of the term "state" in the government tort liability act (MCL 691.1407) was

appropriate. Such an application would correct the prior error, but give due deference to the “extensive reliance” based on the Court’s prior “longstanding interpretation.” 465 Mich at 697.

Similarly, there should be prospective application here. Such a result would give due deference to the hundreds of years of reliance by parties and the courts on the doctrine. Indeed, the 14 years of “longstanding” interpretation overruled in *Pohutski* is dwarfed by the over 150 years that the Courts have applied the doctrine to “uplift” Michigan’s statute of frauds.

II. THIS COURT SHOULD AFFIRM THE COURTS BELOW AND APPLY THE EQUITABLE ESTOPPEL DEFENSE TO PREVENT KELLY-STEhNEY’S RELIANCE ON THE STATUTE OF FRAUDS.

The Court of Appeals correctly affirmed the Trial Court’s summary dismissal of Kelly-Stehney’s claims, finding that Kelly-Stehney mutually assented to the DLO Agreement and that the Agreement was not barred by the statute of frauds, as a matter of law.

In the Opinion, the Court of Appeals recognized that equitable estoppel is not an independent cause of action but is, instead, a doctrine invoked to preclude a party from asserting or denying the existence of a particular fact, “where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts.” *Kelley-Stehney*, 254 Mich App at 616, Apx. 36a. The Court of Appeals correctly found that each of these elements exists in this case and that Kelly-Stehney’s claim for commissions is barred.

The Court properly found that Kelly-Stehney’s words and actions intentionally induced MacDonald’s to believe that Kelly-Stehney had assented to the DLO Agreement. *Id.* at 617, Apx. 36a. Indeed, at his deposition, Mr. Stehney testified that he knew that MacDonald’s was paying Kelly-Stehney commissions according to the DLO Agreement terms – based on reduced rates and a fixed piece price of \$21.86 – but that Kelly-Stehney accepted, without

objection, commissions paid according to those reduced rates for years because it did not want MacDonald's to terminate the contract. *Id.* The Court also found that Kelly-Stehney:

. . . did not firmly object orally or in writing to the commission rates or base price until May 31, 2000, which was after [MacDonald's] terminated the contract and more than three years after the oral DLO agreement was made. [*Id.* at 618, Apx. 37a.]

And, it reasoned:

[Kelly-Stehney's] failure to object to the terms of a modification of an agreement within a reasonable time is an indication that the parties agree to the modification. . . .

[Kelly-Stehney] argues that its acceptance of the base price and commission checks was not enough to establish that it assented to the oral DLO agreement. Stehney testified that he accepted the reduced commissions checks only because defendant was going through a difficult financial time and he wanted to accommodate defendant. However, "[a] meeting of the minds is judged by an objective standard looking to the express words of the parties and their visible acts, not their subjective states of mind. . . ." Similarly, under an estoppel analysis, Stehney's subjective state of mind is not relevant in determining whether plaintiff induced defendant into believing that it had assented to the oral DLO agreement. On June 22, 1999, Stehney wrote a letter to defendant stating, "Kelly-Stehney has been most accommodating and flexible in yielding to your requests for adjusting our commissions over the past several years on the DLO program." This evidence demonstrates that plaintiff accepted the reduced commission rates; it does not demonstrate that plaintiff expected to be reimbursed in the future. Stehney's testimony shows that plaintiff accepted the reduced rates and base price out of a fear that defendant would terminate the contract if plaintiff did not accept these reduced rates. [*Id.* at 618-619, Apx. 37a (citations omitted).]

The Court of Appeals correctly rejected Kelly-Stehney's position that it did not induce MacDonald's into believing that it had assented to the DLO agreement. (*Id.* at 620-621, Apx. 37a-38a). In so doing, it held:

We conclude that [Kelly-Stehney's] acceptance of the reduced commissions checks, [Kelly-Stehney's] silence and failure to firmly object, and [Kelly-Stehney's] act of continuing to work for

[MacDonald's] while accepting the commissions checks show that [Kelly-Stehney] intentionally or negligently induced [MacDonald's] to believe that it had accepted the terms of the oral DLO agreement. [Kelly-Stehney] did not object because it did not want to jeopardize its business relationship with defendant or risk defendant's termination of the contract. Instead, [Kelly-Stehney] waited until after the contract was terminated to object. In this way, [Kelly-Stehney] misled [MacDonald's] into believing that it had accepted the terms of the oral DLO agreement. [*Id.* at 621, Apx. 38a.]

The Court of Appeals also properly concluded that, as a matter of law, MacDonald's justifiably relied upon Kelly-Stehney's acceptance of the terms of the DLO agreement and would be prejudiced if Kelly-Stehney were permitted to deny the validity of the Agreement. *Id.* at 621-624, Apx. 38a-39a.

All of the so-called "facts" that Kelly-Stehney points to in its Brief to manufacture a triable fact-issue were considered and rejected by the courts-below as insufficient. (*See* K-S Brf., pp. 13, 14-15) (citing Apx. pp. 3a-4a, 5a-9a, and 11a-16a, respectively), and *Kelley-Stehney*, 254 Mich App at 616-624, Apx. 36a-39a (rejecting proffered evidence)). These arguments are not properly before this Court, based on Plaintiff's Application for Leave to Appeal.

As the lower courts correctly recognized, there is no fact issue for trial; rather the undisputed material facts and well-established law preclude Kelly-Stehney from denying the DLO Agreement.

III. THIS COURT SHOULD ALSO AFFIRM SUMMARY DISMISSAL OF KELLY-STEHNEY'S CLAIMS BECAUSE THE DLO AGREEMENT HAS BEEN REDUCED TO WRITINGS THAT MEET THE REQUIREMENTS OF THE STATUTE OF FRAUDS.

This Court should affirm summary dismissal of Kelly-Stehney's claims, because MacDonald's satisfied the writing requirement of the statute of frauds. As MacDonald's argued in both courts below, the statute of frauds does not bar the DLO Agreement because the DLO

Agreement was, in fact, reduced to writings signed by Kelly-Stehney, and those writings met the statutory requirements. *Id.* at 613 and n. 3, Apx. 34a. The Court of Appeals addressed this contention only in passing, affirming the Trial Court solely based on the doctrine of equitable estoppel. *Id.* However, in the Opinion, the Court of Appeals recognized:

The Michigan statute of frauds does not require the entire contract to be in writing, but only requires a ‘note or memorandum of the agreement.’ *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 367; 320 NW2d 836 (1982). In determining what constitutes a note or memorandum sufficient to satisfy the writing requirement. . . , our Supreme Court has refused to adopt a rigid standard. *Id.* ‘Some note or memorandum having substantive probative value in establishing the contract must exist; but its sufficiency in attaining the purpose of the statute depends in each case upon the setting in which it is found.’ *Id.* at 368, quoting *Goslin v Goslin*, 369 Mich 372, 376; 120 NW2d 242 (1963). Only the essential terms of the contract must be reduced to writing. *Opdyke Investment Co, supra* at 369. [*Id.*]

In this case, there are written and signed memoranda that satisfy the statute because they constitute sufficient probative evidence of an agreement regarding DLO commissions in MYs 1998-2000. In fact, here there is not just one check – there are over 36 monthly commission checks that evidence the parties’ agreement that MacDonald’s would pay DLO commissions at rates other than those identified in the MRA. During his deposition, Mr. Stehney admitted that Kelly-Stehney endorsed and deposited each monthly commission check that MacDonald’s paid, without reservation or objection. (Stehney, 146, 150, 152, 160–161, Apx. 93b, 94b, 96b-97b.) He also admitted that the checks were sent with monthly reports that clearly identified the commission rates and base price that MacDonald’s paid to Kelly-Stehney on every sale of DLO parts, (including that the rates were 2% in MY 1998 and 1.5% in MY 1999), and that the base price for all years was a fixed \$21.86, without exception. (Stehney, 134–136, 145–146, Apx. 90b, 93b; *see also* representative examples of the endorsed checks and detail reports, Apx. 29b-55b.)

And, there is yet another signed writing evidencing the existence of the DLO Agreement. In a June, 1999 letter, Mr. Stehney states that Kelly-Stehney had “been most accommodating and flexible in yielding to [the] requests for adjusting [Kelly-Stehney’s] commissions over the past several years on the DLO program.” (Letter, Apx. 132b-133b.) The letter was written after commissions had been paid at the reduced 2% rate for ten months and at the \$21.86 fixed base price for two years. This is sufficient probative evidence of the existence of the DLO Agreement to satisfy the statutory writing requirement.

This Court and the Court of Appeals have upheld as enforceable oral agreements based upon less written evidence. See *Barton v Molin*, 219 Mich 347; 189 NW 74 (1922). In *Barton*, this Court held that an endorsed check and corresponding receipt met the statute’s writing requirement. There, the check included a brief recitation that the check was to apply to the purchase price of a particularly described piece of property. It was endorsed by the payee-seller of the property and was paid in due course. The receipt stated that it was for a later payment for a deposit on property of the same description. *Id.* at 349-50. This Court held:

... [b]y putting together and so considering the references in the two writings to the property upon which payments were made, a contract of sale and purchase is fairly shown of property described in identifying terms sufficient to fit and fairly comprehend it as the subject of the contract, to an extent that specific performance could be enforced by a bill in chancery therefor against the vendor.

* * *

Under such conditions the vendee cannot repudiate it where the vendor is not in default and recover payments made thereon.

Id. at 352. See accord, *Duke v Miller*, 355 Mich 540, 542, 544; 94 NW2d 819 (1959) (holding that a memorandum of amount received as down-payment on a sale was sufficient to satisfy the statute of frauds); *Klymyshyn v Szarek*, 29 Mich App 638, 640 and 642; 185 NW2d 820 (1971) (finding that a dated memorandum signed by real estate owners satisfied the statute of frauds

when the writing merely stated that owners had received from proposed buyer “\$500.00 as deposit to purchase apt. at 20001 Conant, for \$94,000.00.”)

Courts in other jurisdictions have found the writing requirement to be satisfied under similar circumstances. In a strikingly similar sales commissions case, a federal court of appeals held that forty-six checks from the company to the sales representative in payment of commissions over the course of four years, along with corresponding commission reports and ledger cards, satisfied the statute of frauds. *Marcella v ARP Films, Inc*, 778 F2d 112, 114-116 (CA 2, 1985).

The United States District Court for the Eastern District of Michigan applied these principles and held that a \$2,500 check that was endorsed and deposited by the defendant was “a sufficient written record of some sort of agreement to satisfy the statute’s demands,” and was “a sufficient writing to bind [the defendant] to some sort of agreement with Plaintiff. . . .” *Adell Broadcasting Corp v Cablevision Industries*, 854 F Supp 1280, 1291 (ED Mich, 1994). The written record in *Adell* satisfied the statute, even though it did not recite all of the terms of the agreement, because it constituted a note “having ‘substantial probative value in establishing that the contract must exist’” *Id.* (citations omitted).

The Court of Appeals relied upon *Adell Lindeman v Johns*, No. 223582, 2001 WL 1079044 (Mich Ct App Sept 14, 2001) (AD1-AD2). In *Lindeman*, the Court held that an endorsed check that indicated that it was for a “land lease” “adequately evidenced [a] contract for plaintiff’s ability to harvest his crop on a multi-year basis” so as to satisfy the statute of frauds. *Id.* at * 1. This holding rested on a finding that the phrase “land lease” “logically implied the ability to harvest the crops planted on the lease land, including crops that could by their nature only be harvested profitably in years after they were planted.” *Id.* Evidence adduced

at trial established that the crop at issue was a hay crop that the plaintiff planted in 1996, with the defendant's knowledge, and that the crop yielded profits in 1997-1999. *Id.* While the writing did not manifest all of the terms of the agreement, it was sufficient probative evidence that an agreement existed regarding crops so as to satisfy the statute of frauds. *Id.*

As in *Barton*, *Adell*, *Lindeman* and *Marcella*, in the instant case, the statute's written memorandum requirement has been met.

IV. TWO OTHER WELL-ESTABLISHED EXCEPTIONS TO THE STATUTE OF FRAUDS APPLY AND ARE ALTERNATIVE GROUNDS SUPPORTING THE LOWER COURT'S SUMMARY DISMISSAL OF KELLY-STEHNEY'S CLAIMS.

There are two other well-established exceptions to the statute that apply and support the lower court's summary dismissal of Kelly-Stehney's claim. As the Court of Appeals recognized, MacDonald's also maintains that the statute of frauds does not bar the DLO Agreement because (1) the parties fully performed the agreement, and (2) Kelly-Stehney ratified the agreement. *Kelly-Stehney*, 254 Mich App at 613, Apx. 34a.

While the Court of Appeals declined to address these arguments, *id.*, these additional defenses also apply and legally preclude Kelly-Stehney's claims.

First, the statute does not bar the DLO Agreement because the parties have fully performed according to the Agreement. This Court has recognized and applied the "complete performance" or "executed contract" exception to the statute of frauds in the factually similar case of *Korby v Sosnowski*, 339 Mich 705; 64 NW2d 683 (1954). *Korby* involved a claim by a plaintiff to recover excess commissions retained by a real estate broker. *Id.* at 707. The plaintiff claimed that the parties had "an implied understanding that defendant's commissions were to be at the usual rate." *Id.* The defendant argued that the statute barred the plaintiff's claim. *Id.* at 711. This Court applied the "complete performance" exception and ordered entry of judgment in favor of the plaintiff. *Id.* at 711-12. The Court stated: "the statute relate[s] only to agreements,

promises, or contracts which have not been fully executed. [It] may not be applied to and thereby afford a basis of recovery incident to fully consummated transactions” *Id.* at 711 (quoting *National Bank of Detroit v Wing*, 318 Mich 436, 444; 28 NW2d 236 (1947)). See also *Pine-Wood, Ltd v Detroit Mortgage & Realty Co*, 95 Mich App 85, 89–92; 290 NW2d 86 (1980) (the statute does not apply to executed agreements).

Second, the statute does not bar the DLO Agreement because Kelly-Stehney ratified the Agreement. See *Shuell v London Amusement Co*, 123 F2d 302, 306–307 (CA 6, 1941) (recognizing that a contract for the sale of land is void if not in writing “unless ratified and adopted” by the party against whom the contract is being enforced) (citing *Detroit P&N R Co v Hartz*, 147 Mich 354, 364; 110 NW 1089 (1907); *Dickenson v Wright*, 56 Mich 42, 47; 22 NW 312 (1885) (recognizing that distinct acts of ratification can legalize contracts otherwise invalid under the statute of frauds).

Ratification occurs when the parties admit in word or deed their intention to perform in accordance with an oral agreement. *Central Jersey Dodge Truck Center, Inc v Sightseer Corp*, 608 F2d 1106, 1113–14 (CA 6, 1979). See also *Forge v Smith*, 458 Mich 198, 208–209; 580 NW2d 876 (1998), citing *Detroit P&N R Co*, *supra* at 364 (recognizing that “[c]ontracts conveying an interest in land made by an agent having no written authority are invalid under the statute of frauds unless ratified by the principal.”). Cf., *Jefferson v Kern*, 219 Mich 294, 298; 189 NW 195 (1922) (holding that the oral promise could not be ratified where there was no evidence of defendant’s manifest assent to its terms).

In *Central Jersey*, the plaintiff claimed that it had an oral agreement under which the defendant would repurchase certain vehicles if the plaintiff was unable to sell them. *Id.* at 1108. The Sixth Circuit found evidence of an oral agreement, including: (1) the plaintiff ordered

eight vehicles above the minimum dealer order in reliance upon the defendant's alleged promise to re-purchase un-sold vehicles; and (2) the defendant's employees "kept [the plaintiff] believing that the buy-back would be effective up until the very end . . . leading [the plaintiff] to believe that the oral repurchase agreement was still in effect," *Id.* at 1112. Based on these facts, the Court held: "[T]he equities lie with [the plaintiff] in this case. [It] was actively led to believe throughout the entire period in which it had dealings with [the defendant] that [the defendant] would buy back those vehicles which [the plaintiff] was unable to sell." *Id.* Thus, "the agreement [was] not barred by the statute of frauds because the parties [had] admitted in word and deed their intention that [the defendant] would buy back those vehicles. . . ." *Id.* at 1114.

Like the defendant in *Central Jersey*, in this case Kelly-Stehney has ratified the Agreement. Kelly-Stehney "kept [MacDonald's] believing" that the DLO Agreement was effective by accepting and depositing commissions paid according to that Agreement for three years without contest. (Stehney, 145–152, 155–157, 160–162, Apx. 93b-94b, 95b-97b.) MacDonald's reliance was substantial – it surrendered its contractual right to terminate the contract in 1997 and avoid paying more than \$1.75 million in commissions. (See Stehney, 146–148, 153, 154–157, 159–162, Apx. 93b, 95b-97b.)

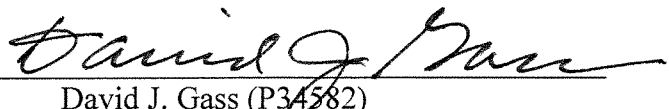
CONCLUSION

For the above reasons, this Court should **AFFIRM**.

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.
Attorneys for Defendant/Appellee, MacDonald's
Industrial Products, Inc.

Dated: October 2, 2003

By



David J. Gass (P34582)
S. Grace Davis (P58412)
Salvatore Pirrotta (P62596)

Only the Westlaw citation is currently available.

NOTICE: THIS IS AN UNPUBLISHED OPINION.
SEE MI R A MCR 7.215 FOR RULES REGARDING
THE USE AND CITATION OF UNPUBLISHED
OPINIONS.

Court of Appeals of Michigan.

David M. LINDEMAN, Plaintiff-Appellee,
v.
Douglas J. JOHNS and Elizabeth S. Johns,
Defendants-Appellants.

No. 223582.

Sept. 14, 2001.

Before: K.F. KELLY, P.J., and WHITE and TALBOT,
JJ.

PER CURIAM.

*1 Defendants appeal as of right from a judgment for plaintiff entered on a jury verdict in the amount of \$24,721.99, including costs and judgment interest, in this action for breach of a farm lease. We affirm.

In their first claim of error, defendants assert that the evidence was insufficient to support the jury's finding that the lease agreement was evidenced by a writing satisfying the requirement of the statute of frauds, M.C.L. § 566.132(a), that contracts that by their terms cannot be performed within one year must be evidenced by a writing containing a signature made or authorized by the party against whom recovery is sought. We disagree. Evidence presented to the jury indicated that plaintiff was seeking damages for loss of a hay crop planted in 1996, and that a lease for the land in 1996 was evidenced by a writing signed by defendant Elizabeth Johns on behalf of both defendants, in the form of an endorsed check for a "land lease," for the year 1996. In *Adell Broadcasting Corp v. Cablevision Industries*, 854 F Supp 1280, 1291 (ED Mich, 1994), the court applied Michigan law and determined that a check endorsed by the opposing party constituted sufficient evidence to satisfy the statute of frauds. In the case at bar, where the check indicated that it was given for a "land lease," the contract logically implied the ability to harvest the crops planted on the leased land, including crops that could by their nature only be harvested profitably in years after they were planted. Evidence adduced at trial indicated that

the cost of the hay crop plaintiff planted in 1996 could only be recouped in future years, that defendants knew plaintiff had planted the crop, that plaintiff could have expected profits from the hay field had he been permitted to harvest it in 1997, 1998, and 1999, and that plaintiff was denied these profits. The check for the land lease signed on behalf of defendants adequately evidenced this contract for plaintiff's ability to harvest his crop on a multiyear basis. See *Opdyke Inv Co v. Norris Grain Co*, 413 Mich. 354, 367-368; 320 NW2d 836 (1982). We conclude there was sufficient evidence to support the jury's finding. *Pontiac School Dist v. Miller Canfield Paddock & Stone*, 221 Mich.App 602, 612; 563 NW2d 693 (1997).

Plaintiff argues that the trial court abused its discretion by submitting the statute of frauds issue to the jury. Our decision that the statute of frauds was satisfied renders this claim moot; however, we note that the trial court actually allowed defendants to go forward with their statute of frauds defense at the express suggestion and stipulation of plaintiff's counsel, so that plaintiff is in any event barred from raising this issue. *Weiss v. Hodge (After Remand)*, 223 Mich.App 620, 636; 567 NW2d 468 (1997).

Next, defendants contend that the trial court erred in submitting the equitable claim of unjust enrichment to the jury. Defendants also maintain that the trial court erred in entering judgment on the verdict without making express findings that the court was accepting an advisory verdict by the jury, and giving its reasons for doing so. Because defendants did not object to the submission of this claim to the jury, and indeed approved the jury instructions, they have waived review of this issue absent manifest injustice. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich.App 662, 683-684; 591 NW2d 438 (1998); *Phinney v. Perlmutter*, 222 Mich.App 513, 537; 564 NW2d 532 (1997). Moreover, defendants clearly suffered no prejudice as a result of the alleged error because the trial court entered judgment on the breach of contract claim only.

*2 Finally, defendants argue that the jury's award of damages in the amount of \$21,440 on the breach of contract claim was excessive and contrary to law. Based upon our review of the record, the jury could have found that plaintiff lost profits of well over \$40,000 from his inability to harvest the hay crop in successive years. Plaintiff was entitled to compensation for his foreseeable lost profits. *Lawrence v Will Darrah & Associates, Inc*, 445 Mich. 1, 15-16; 516 NW2d 43

(Cite as: 2001 WL 1079044, *2 (Mich.App.))

(1994). Because there was sufficient evidence to support the jury's award, we will not disturb it. *Pontiac School Dist, supra* at 612.

Affirmed.

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(Cite as: 1994 WL 505271 (Ohio App. 8 Dist.))

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CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

200 WEST APARTMENTS, Plaintiff-Appellant,

v.

Andrew J. FOREMAN, Defendant-Appellee.

No. 66107.

Sept. 15, 1994.

Civil appeal from Rocky River Municipal Court,
No. 92-CVF-1349.

James G. Wyman, Brook Park, for
plaintiff-appellant.

Edward Gregory, Cleveland, for
defendant-appellee.

OPINION

PORTER, Judge.

*1 Plaintiff-appellant 200 West Apartments appeals from the trial court's decision denying additional rent and late charges arising from defendant-appellee's occupancy of an apartment. Plaintiff claims the trial court erred in recognizing an oral modification of the written lease contrary to the Statute of Frauds (R.C. 1335.05) and denying late charges and certain rent payments. We find no error and affirm.

Defendant met with Daniel Miclau, general partner of plaintiff, in February 1992 to discuss potential employment as a property manager for plaintiff which operated apartment buildings. Defendant's experience as a property manager in Cleveland and his knowledge of computers was discussed. Mr. Miclau also discussed potential employment of

defendant as a manager of plaintiff's property in North Ridgeville, a position expected to be open in the near future.

In the meantime, plaintiff hired defendant to do some computer consulting work for \$10.00 an hour. Defendant was given confidential information regarding the sale price, income, and expense figures of the North Ridgeville property in April 1992 in order to familiarize him with the property.

At the time of the initial interview, defendant was living rent free with his parents in Elyria, Ohio. Since Mr. Miclau wanted him to become familiar with the plaintiff's property, defendant moved into an apartment in mid-February 1992. He signed a 13 month lease because he believed: (1) he had interim employment working on plaintiff's office computer system; (2) he only had to pay one-half the \$450.00 rental amount stated in the lease; and (3) he would subsequently have full time employment as building manager of the North Ridgeville property.

After moving in, defendant paid \$225.00 for February rent and \$200.00 as a security deposit. Under the employment arrangement obliging him to pay one-half the stated \$450.00 rental amount, defendant paid \$125.00 for March (the amount actually owed for one-half of February). Thereafter, he paid \$225.00 monthly rent through August 1992 which was accepted by plaintiff.

In early August 1992, defendant received a letter from Mr. Miclau, dated July 31, 1992, notifying him that "the anticipated work items did not materialize," i.e., the manager position at the North Ridgeville properties was no longer available and that he would have to begin paying \$450.00 a month for rent starting in August 1992. However, he paid only \$225.00 for August 1992, but sent plaintiff two checks for \$450.00 each in September and October 1992. When child support payments were taken from his checking account during those two months the September and October rent checks were returned marked NSF (not sufficient funds). Defendant vacated the apartment in late October 1992 after he received a formal notice to vacate.

Plaintiff commenced this action in Rocky River Municipal Court to recover \$5,205 in damages allegedly owed under the written lease. The trial court found that the written lease was orally

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modified by acts of the parties when plaintiff agreed to accept rent in the amount of \$225.00 a month in exchange for the services provided by defendant. The court, without opinion, awarded \$754.00 in back rent and denied the \$2.00 per day late charges and any rent after defendant quit the premises for the balance of the term. The \$754.00 judgment represents rent for September and October 1992 at \$450.00 per month (\$900.00), apartment damages of \$28.00 and bounced check charges of \$26.00, offset by defendant's security deposit of \$200.00. A timely appeal ensued.

*2 Due to the plaintiff's failure to supply a transcript of the proceedings below or request findings of fact and conclusions of law, our review will be restricted to the Statement of Evidence settled and approved by the Court pursuant to App.R. 9(C).

We will address plaintiff's Assignments of Error I and III together because of the common questions involved.

I. THE TRIAL COURT'S FINDING THAT APPELLEE DID NOT OWE RENT FOR THE MONTHS OF MARCH, 1992 THROUGH AUGUST, 1992 AND DID NOT OWE ANY RENT FOR THE MONTHS OF OCTOBER, 1992 THROUGH MARCH OF 1993 IS CONTRARY TO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. THE TRIAL COURT ERRORED [SIC] IN FINDING THERE WAS AN ORAL MODIFICATION OF A WRITTEN LEASE, THEREBY DENYING DAMAGES TO APPELLANT, AS SUCH FINDING IS CONTRARY TO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

We find that the trial court did not err when it held that defendant was not liable for additional rent for the months of March 1992 through August 1992 and for the period November 1992 through March 1993.

The trial court expressly found from the evidence that the written lease was orally modified from the out-set. The landlord herein argues that the Statute of Frauds (R.C. 1335.04-.05) prevents oral modification of a written lease agreement. While true as a general proposition, an exception applies when the parties to the written agreement act upon the terms of the oral agreement. Therefore, when

an agreement as orally modified has been acted upon, as in the instant case, the rights of the parties are to be determined by the modified agreement. *Nonamaker v. Amos* (1905), 73 Ohio St. 163; 51 O.Jur.3d *Statute of Frauds*, § 108, p. 253. Although defendant signed a written lease for 13 months at \$450.00 a month rent, he actually paid and plaintiff accepted one-half that amount for February 1992 through August 1992, an acknowledgment of and action upon the orally agreed mutual arrangement. This represents "an accomplished fact, an executed agreement which means that the plaintiff cannot now treat the rental reductions as a nullity for want of consideration and sue for the unpaid portions called for by the original stipulations of the lease." *Wessel v. Newhof Stores, Inc.* (1938), 26 O.L.Abs. 621, (Hamilton C.P.). The oral agreements in February and August of 1992 and the parties subsequent adherence to them effectively modified the written lease agreement.

According to the Rule 9(C) Statement of Evidence, defendant moved out of his parents home where he had lived rent free and signed the thirteen month lease with the oral understanding of an apartment at one-half the stated rental amount; interim employment as a computer consultant; and the promise of full-time employment as a building manager. Plaintiff accepted the one-half rent from February through August 1992 and employed defendant as a computer consultant. Later, after defendant hired someone else for the building manager's position, it unilaterally attempted to reinstate the original lease agreement. Defendant vacated the apartment at defendant's request in October 1992 after he was unable to afford the \$450.00 rent for both September and October 1992.

*3 The trial court in the 9(C) Statement of Evidence found that:

The evidence did reflect an employment agreement between the parties and a promise of prospective employment. * * * that the \$1350 partial rent claim and the \$3,150 loss of rent claim were invalid because of the oral modification of the written rental agreement. (Pars. 15-16.)

We find support for this conclusion in Restatement of Contracts 2d § 150, p. 376:

Reliance on Oral Modification

Where the parties to an enforceable contract subsequently agree that all or part of a duty need

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not be performed or of a condition need not occur, the Statute of Frauds does not prevent enforcement of the subsequent agreement if reinstatement of the original terms would be unjust in view of a material change of position in reliance on the subsequent agreement.

Plaintiff argues that an employment agreement never existed, and if it did, that it was totally separate from the lease agreement. The trial court found otherwise based on adequate evidence in the case. We will not disturb that result. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 280; *Software Clearing House, Inc. v. Intrak, Inc.* (1990), 66 Ohio App.3d 163, 170

It is difficult for plaintiff to overcome Joint Exhibit 14, written by Mr. Miclau, plaintiff's general manager, to defendant, which stated:

Since several of the work items that I anticipated have not materialized, this is to inform you that starting in August you will be expected to pay the full sum of \$450.00 as rent per the terms of the lease.

Maybe you can figure up your work time and relate that back for the previous month's rent. If you have any questions, please call me.

This is compelling evidence that the employment agreement was intertwined with the rental arrangement and when the apartment manager job failed to materialize, defendant was no longer bound for the balance of the lease term.

We also note that, although plaintiff claims that it "made all reasonable efforts to mitigate its damages" presumably by attempting to rent the vacated premises, the trial court deleted that conclusion from the Rule 9(C) Statement of Evidence.

As the Statement of Evidence reveals, the trial court's findings are not against the manifest weight of the evidence.

Assignments of Error I and III are overruled.

II. THE TRIAL COURT ERRORED [SIC] IN DENYING APPELLANT LATE CHARGES AS THE LEASE CLEARLY CALLED FOR SAID

CHARGES AND SAID FINDING IS CONTRARY TO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

We also find that the trial court did not err when it excluded defendant's claim of \$166.00 for late charges. Plaintiff argues that the \$2.00 a day late charge is not a liquidated damage amount nor a punitive charge but rather a fee to cover extra administrative costs due to delinquent payments. Plaintiff has failed to adduce any evidence to show it sustained any actual damages to justify an award of late charges.

*4 This Court has previously held that late charges not reasonably related to the damages incurred are a penalty and thus unenforceable. See *Berlinger v. Suburban Apartment Mgmt. Co.* (1982), 7 Ohio App.3d 122, 125; *Siara Management v. Nedley* (Oct. 14, 1992), Cuyahoga App. No. 61433, unreported. In *Siara Management*, we held that, since the landlord sued for lost rent and recovered it, the late charge would be a penalty and thus, unenforceable.

Plaintiff's claim for late charges is for the period commencing after defendant paid \$225.00 for August 1992 through October 1992. The trial court held that defendant had paid August rent in full but that he was liable for rent for September and October 1992 and awarded plaintiff damages for those two months. Since plaintiff has been awarded the lost rent for this period, an award of late charges would be a penalty and thus, unenforceable. *Siara Management, supra*.

We find no merit to this assignment of error and it is overruled.

Judgment affirmed.

DYKE and WEAVER, JJ., concur.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

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